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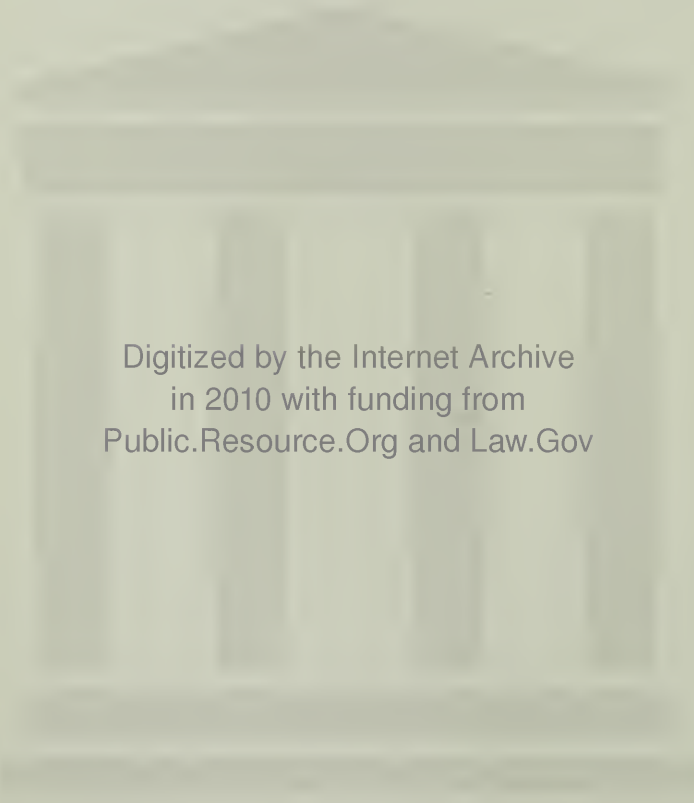
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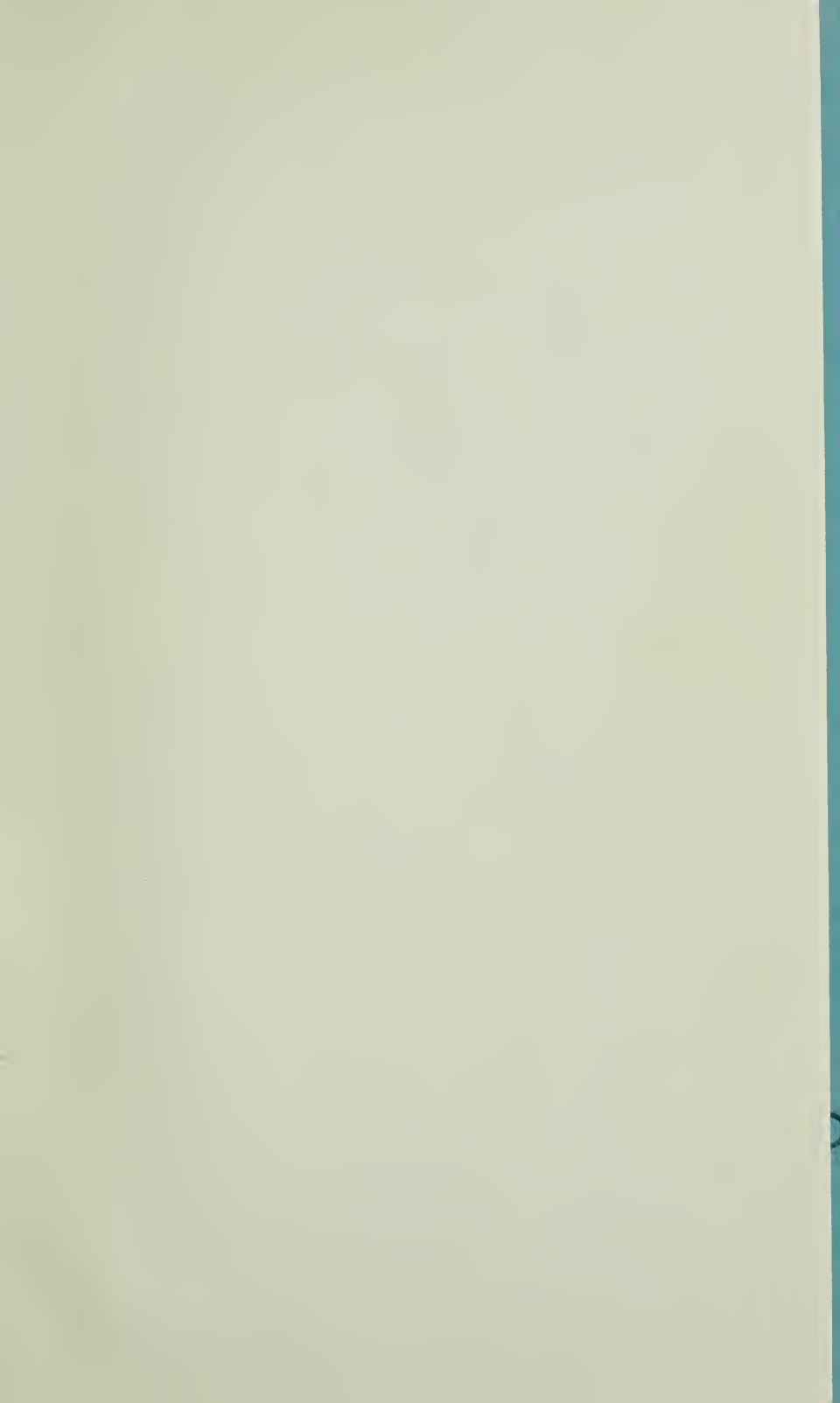
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N. 2949

No. 14,872

United States Court of Appeals
For the Ninth Circuit

HARMON M. WALEY,

vs.

UNITED STATES OF AMERICA,

Appellant,

Appellee.

Upon Appeal from the District Court for the
Western District of Washington,
Southern Division.

Honorable George H. Boldt, Judge.

APPELLANT'S BRIEF.

HARMON M. WALEY,

P. M. Box 248, Alcatraz, California,

Appellant Pro Se.

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**United States Court of Appeals
For the Ninth Circuit**

HARMON M. WALEY,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the District Court for the
Western District of Washington,
Southern Division.

Honorable George H. Boldt, Judge.

APPELLANT'S BRIEF.

Comes appellant, Harmon M. Waley, on appeal from the United States District Court for the Western District of Washington, Southern Division, as provided by 28 U.S.C.A. 2255, law, and make following summary of case.

SUMMARY OF FACTS.

Appellant introduced motion into above said Court under 28 U.S.C.A. 2255, moving Court to set aside conviction, judgment, sentence, and commitment in case 14,852, U. S. v. Waley, and bring him into Court

for proper trial by jury, which right Amendment Six, United States Constitution, affords him, and having deprived him of such right.

On June 15, 1955, without a hearing being held upon matters of fact involved, upon a basis of law alone, trial Court denied motion said.

As trial Court record discloses, rather only a proper hearing would disclose, that on June 20, 1935, my wife then asked me to ask the trial Court about the indictment, which such Court declined to answer; whereupon, Mr. Hughes, Assistant United States Attorney, advised appellant that one Stephen J. O'Brien, Esq., was there from Mr. John Dore's office in Seattle, Washington, to represent appellant's wife, and to tell Court to appoint him, Mr. Stephen J. O'Brien, which appellant did, requesting same for his wife. Thereupon, Mr. O'Brien gave the Court a letter from a Mr. Louis Craven, not Haven, attorney at law, in Salt Lake City, Utah, addressed to said John Dore, Esq., of Seattle, Washington, requesting him to handle the case. Mr. O'Brien clearly and distinctly told the Court that John Dore had asked him to appear in Court for him, for reason that John Dore had a case in state Court at Bellingham, Washington, and could not be there that day. Mr. O'Brien further informed trial Court that the letter from Mr. Craven, of Salt Lake City, requested Mr. Dore to defend Margaret E. Waley, which trial Court acknowledged. A great deal of the discussion regarding the letter between the Court and Stephen J. O'Brien, Esq., does not appear on the record, e.g., they had an extremely

hard job making out the name signed to the letter; and, Mr. Stephen J. O'Brien most certainly did not tell Court that said Louis Craven was of John Dore's office in Seattle. Record hereinabove noted, as to June 20, 1935, is entirely in error, no doubt but purposely falsified to keep appellant railroaded into prison without proper trial by jury upon an offense he did not commit.

Now as to trial Court record sent up herein as to June 21, 1935, the record is not in proper sequence of events, viz., after taking pleas of guilty from appellant and Margaret E. Waley, Court next asked if appellant had anything to say before sentence was passed. The appellant then said, "All I have to say is for my wife, if I can say that." The Court allowed such statement. Next, Mr. O'Brien stepped in with the statement beginning, "With reference to Mrs. Waley * * *" Again, the Court distinctly, of each defendant, requested a plea to count one, then as to count two, of the indictment. Finally, the Court did not ask Mr. O'Brien the first two questions, which are listed by the record herein, such was not mentioned by trial Court at all. The trial Court asked Mr. O'Brien if he had conferred with the defendants; and, if he, Mr. O'Brien, was ready to proceed with the case. No such questions were asked as the record discloses, if defendants understood that he was appointed as counsel, or whether "*they*" accepted him, Mr. O'Brien, as counsel, etc. Except for a single change of the words "*her*" and "*she*" to "*them*" and "*they*", the record is true as to the following:

“Mr. O’Brien. I have advised my client and she desires to plead guilty to the charge.

The Court. I will not sentence on a plea qualified by any such statement.

Mr. O’Brien. Mr. Waley says it has been explained to him and to Mrs. Waley that she was guilty of conspiracy under this Act. I have advised with *her*, Your Honor, and *she* still desires to plead guilty.”

(Appellant has substituted “*her*” and “*she*” for “*them*” and “*they*”, to give the true statement made by trial Court in re the above.) Now just following the above is a statement of the trial Court which goes to prove the record herein, so called, is not in proper sequence of events, to wit:

“The Court. On your statement *as well as that statement just made*, sentence will not be pronounced.” (Emphasis supplied.)

The “*statement just made*” referred to by the Court was appellant’s plea in behalf of his wife, which was made just prior to the foregoing.

Contrary to decision in *Waley v. Johnston*, 139 F. (2d) 117, appellant did not have aid of counsel. Mr. Stephen J. O’Brien was counsel for Margaret E. Waley, as agent for John Dore of Seattle, and not counsel for appellant. Mr. O’Brien did not act for, nor advise appellant, in any way, but concentrated upon defense of Margaret E. Waley, in talking to appellant. Further, the appellant has never had a hearing regarding whether or not he had counsel,

most certainly not in the District Court upon which this Circuit Court based above opinion, which is not according to fact. The appellant has been under impression that a conspiracy exists in the United States Courts to prevent him from proper trial, etc., but in view of this record, which he has carefully examined, appellant desires to apologize to this Honorable Court for evil thoughts of them. Apparently the record has been deliberately made a fallacy, or twisted, by the trial Court in order to keep appellant railroaded into prison for an offense he did not commit without fair jury trial and without aid of counsel, because the trial Court knows full well they have no evidence of the appellant's guilt in the charge, and never produced any evidence of interstate transportation of a kidnapped person in the trial of the defendant Margaret E. Waley, and can't produce any now.

Trial Court did not advise appellant as to his right of jury trial, nor to the effects of pleas of guilty and not guilty, prior to his entering plea, as commonly done by Courts; and, appellant was a very young, ignorant person with no knowledge of law, and without advice. Trial Court record, so called, fails to show that Court found appellant's plea was entered intelligently, understandingly, and voluntarily, and that appellant knew that he had right to be heard by jury in the case instead of by arbitrary action of the trial Court. Yet the Court knew full well appellant was subjected to a grave and serious charge, and stated as much on their so-called record.

QUESTIONS PRESENTED.

1. Was Stephen J. O'Brien acting for John Dore, Esq., in defense of Margaret E. Waley; and, if so, wasn't appellant deprived of counsel to advise and defend him?

2. In order to waive his right of trial by jury, is it not essential for appellant to have so done competently and intelligently; and, is not a waiver an intelligent relinquishment of a known right?

3. Does a plea of guilty waive the fundamental right of trial by jury, or is not that right a separate and distinct thing from such judicial confession?

4. Does not the Act of Congress of June 22, 1932, as amended March 18, 1934, Section 408(a) and 408(b), require a trial by jury in order to determine whether the death penalty shall apply and be inflicted?

5. Isn't a plea of guilty a judicial confession; and, doesn't the law require the *corpus delicti* of interstate transportation of a kidnapped person receive corroboration from a source outside of the person making such confession in order to prevent injustice in convicting insane or innocent persons, or does the law just allow anyone to run down and confess to anything in order to keep the jails filled?

6. Since the Supreme Court has denoted 28 U.S.C.A. 2255 to be similar to and more than a writ of habeas corpus, is it required that there be hearings on matters of fact?

ARGUMENT AND AUTHORITIES.

1. WAS STEPHEN J. O'BRIEN ACTING FOR JOHN DORE, ESQ., IN DEFENSE OF MARGARET E. WALEY; AND, IF SO, WAS NOT APPELLANT DEPRIVED OF COUNSEL TO ADVISE AND DEFEND HIM?

While they say, in *Johnson v. Zerbst*, 304 U.S. 458, 82 L.Ed. 1461, 146 A.L.R. 357, that any right, trial by jury, or of counsel, guaranteed defendant under the United States Constitution has been abridged the trial Court has no jurisdiction to adjudge guilt nor to issue a judgment. And that a defendant has the right of undivided and effective aid of any counsel appointed where, as here, there are two separate and distinct defenses to be prepared. *Taylor v. U. S.*, 226 F. (2d) 337; *Wright v. Johnston*, 77 Fed. Supp. 687; *Glasser v. U. S.*, 315 U.S. 60, 62 Sup. Ct. 457.

2. IN ORDER TO WAIVE HIS RIGHT OF TRIAL BY JURY IS IT NOT ESSENTIAL FOR APPELLANT TO HAVE SO DONE COMPETENTLY AND INTELLIGENTLY; AND, IS NOT A WAIVER AN INTELLIGENT RELINQUISHMENT OF A KNOWN RIGHT?

A defendant in a criminal action is entitled to a trial by jury as a matter of right. United States Constitution, Amendment 6; United States Constitution, Article III, Section 2, Clause 3; *Callan v. Wilson*, 127 U.S. 540, 547, 32 L.Ed. 223.

A waiver is an intentional giving up of a right known; if, as here, a defendant didn't know such existed as a matter of right there could be no waiver. See, *Johnson v. Zerbst*, *supra*.

According to all authorities, there must be an oral or written waiver of right of trial by jury. Fed. Crim. Proc., Rule 23(a); Amer. Law Inst. Code Crim. Proc. (1930), Section 266; *U. S. v. Harrison*, 23 Fed. Supp. 249, aff'g 99 F. (2d) 1017; *Jabozynski v. U. S.*, 53 F. (2d) 1014; *U. S. v. Steese*, 144 F. (2d) 432; *Bardwell v. Hiatt*, 50 Fed. Supp. 913; *Freeman v. U. S.*, 227 Fed. 732, 742, 744; *Dillingham v. U. S.*, 76 F. (2d) 36, 39; *Brown v. Zerbst*, 99 F. (2d) 745; *Ex parte Danziger*, 77 Fed. Supp. 466.

No right of jury was explained appellant by trial Court, nor effect of pleas as to such, and no inquiry was made if the plea was his and voluntary. See, *Patton v. U. S.*, 281 U.S. 276, 298-299, 312-313, 74 L. Ed. 854.

3. DOES A PLEA OF GUILTY WAIVE THE FUNDAMENTAL RIGHT OF TRIAL BY JURY, OR IS NOT THAT RIGHT A SEPARATE AND DISTINCT THING FROM SUCH JUDICIAL CONFESSION?

Herein appellant refers Court to (2) above, and cases cited, also.

A plea of guilty does not waive any fundamental or constitutional right held by a defendant, so it is held by: *Adams v. U. S.*, 126 F. (2d) 744-776; *Adams v. U. S.*, 63 Sup. Ct. 236; *Von Moltke v. Gillies*, 332 U.S. 708; *U. S. v. Chase*, 135 U.S. 255, 34 L. Ed. 117; *Dunbar v. U. S.*, 156 U.S. 185, 39 L.Ed. 390; *Holmgren v. U. S.*, 217 U.S. 509, 54 L.Ed. 861; *Harris v. U. S.*, 277 U.S. 340, 57 L.Ed. 534; *Johnson v. Zerbst*, *supra*.

On motion herein appellant withdrew his plea of guilty, which is permissible after conviction where manifest injustice exists. Fed. Crim. Proc. (18 U.S.C.A.), Rule 32(d); also, *Kercheval v. U. S.*, 274 U.S. 224.

4. DOES NOT THE ACT OF CONGRESS OF JUNE 22, 1932, AS AMENDED MARCH 18, 1934, SECTION 408(a) AND 408(b), REQUIRE A TRIAL BY JURY IN ORDER TO DETERMINE WHETHER THE DEATH PENALTY SHALL APPLY AND BE INFLICTED?

This Act states that a person "shall upon conviction, be punished (1) by death if the verdict of the jury shall so recommend * * * (2) if the death penalty shall not apply nor be imposed the convicted person shall be punished by imprisonment * * *."

The words "*shall*" make it mandatory that a death penalty be imposed if the jury so says, which is impossible to perform, where, as here, there was no jury allowed the defendant. See any standard law dictionary and cases there cited as to the mandatory nature of the word "*shall*" when so used.

5. IS NOT A PLEA OF GUILTY A JUDICIAL CONFESSION; AND, DOES NOT THE LAW REQUIRE THE CORPUS DELICTI OF INTERSTATE TRANSPORTATION OF A KIDNAPPED PERSON RECEIVE CORROBORATION FROM A SOURCE OUTSIDE OF THE PERSON MAKING SUCH CONFESSION IN ORDER TO PREVENT INJUSTICE IN CONVICTING INNOCENT PERSONS, OR DOES THE LAW JUST ALLOW ANYONE TO RUN DOWN AND CONFESS TO ANYTHING IN ORDER TO KEEP THE JAILS FILLED?

No evidence was given as to the *corpus delicti* from an outside source, nor to the grand jury, nor does the government possess any such evidence at all, and none was introduced in the trial of the codefendant Margaret E. Waley, whom the trial Court railroaded into prison instead of dismissing the case for lack of evidence; but, in order to be in position to railroad this nineteen year old girl into prison the trial Court just had to railroad appellant so that no questions would be asked. The law, so says these Courts, requires such corroboration. *Litkopsky v. U. S.*, 9 F. (2d) 844; *Daeche v. U. S.*, 250 Fed. 566, 571, 162 C.C.A. 582, 587; *Mangum v. U. S.*, 289 Fed. 213, 216; *Goff v. U. S.*, 257 Fed. 294; *Rosenfeld v. U. S.*, 202 Fed. 469; *Naftzger v. U. S.*, 200 Fed. 494; *Flowers v. U. S.*, 116 Fed. 241.

Appellant has several times brought this question up to this Court on *habeas corpus* proceedings, and this Court has ignored same as unworthy of deciding. Appellant requests same to be decided.

6. SINCE THE SUPREME COURT HAS DENOTED, 28 U.S.C.A. 2255, TO BE SIMILAR TO AND MORE THAN A WRIT OF HABEAS CORPUS, IS IT REQUIRED THAT THERE BE HEARINGS ON MATTERS OF FACT?

In the motion presented trial Court held no hearing, but issued its order denying the motion, which raised matters of fact, upon the record, so called, alone. The record itself is neither correct nor in proper sequence of events.

The Supreme Court, in *Waley v. Johnston*, 316 U.S. 101, 86 L.Ed. 1302, and *U. S. v. Hayman*, 342 U.S. 205, 96 L.Ed. 232, declares that where, as here, a petition raises matters of fact, petitioner is entitled to a prompt hearing at which he is present.

CONCLUSION.

For the each and every reason set forth above appellant contends the decision of the trial Court should be reversed, and a fair and impartial trial by jury be afforded appellant.

Dated, December 14, 1955.

HARMON M. WALEY,
Appellant Pro Se.

IN THE
United States
Court of Appeals
FOR THE NINTH CIRCUIT

HARMON METZ WALEY,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED
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SOUTHERN DIVISION

HONORABLE GEORGE H. BOLDT, *Judge*

BRIEF OF APPELLEE

CHARLES P. MORIARTY
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TACOMA 2, WASHINGTON

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IN THE
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UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED
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HONORABLE GEORGE H. BOLDT, *Judge*

BRIEF OF APPELLEE

STATEMENT OF THE CASE

On June 21, 1935, appellant upon his plea of guilty to charges of violating the Lindbergh Law (Title 18, U.S.C.A., Section 1201, formerly 408a and 408c), received an aggregate sentence of 45 years' imprisonment imposed by the United States District

Court of the Western District of Washington, Southern Division.

Appellant was thereafter confined in the federal prison on Alcatraz Island, in the Southern Division of the Northern District of California, from which jurisdiction he has sought release by instituting the following previous proceedings:

1. Petition to the Court of Appeals, Ninth Circuit, to allow an appeal from order of May 11, 1939, denying his petition for writ of habeas corpus and certifying his grounds of appeal were frivolous, upon which certificate the appellate court denied appeal in forma pauperis.

Waley v. Johnston, Warden, May 23, 1939, 104 F. 2d 760.

2. Appellant thereafter addressed his application to appeal in forma pauperis from an adverse judgment in habeas corpus proceedings. The appellate court determined such application should be addressed to the district court and denied his application.

Waley v. Johnston, Warden, March 4, 1940, 110 F. 2d 234.

3. Appellant next attempted to have the Lindbergh Law declared unconstitutional because the term of imprisonment was left to the discretion of the trial court.

His appeal from order denying such application resulted in affirmance of the decision of the district court.

Waley v. Johnston, Warden, June 19, 1940, 112 F. 2d, 749, Cert. den., 311 U.S., 649, rehearing den. 311 U.S., 729.

4. A petition for writ of habeas corpus on the ground that threats of FBI agents induced his plea of guilty, which, according to judicial count, was his eighth in said court, resulted in the issuance of a show cause order and appointment of counsel to represent appellant. Following a formal return by the Government, the matter was argued, briefed and submitted upon the petition and the court record, and thereafter the petition was denied.

Waley v. Johnston, Warden, April 15, 1941, 38 Fed. Supp. 408, aff'd. 124 F. 2d 587.

In his petition, we are informed by the appellate decision, he also set up the ground that the kidnapped person was not transported outside the State of Washington.

The majority opinion was to the effect that no question of fact was presented and affirmed the district court's decision.

As pointed to by the district court and discussed by the dissenting member of the appellate, the return

made no denial of the allegations of coercion specifically set forth and relied on in the petition, and in reversing the court of appeals the supreme court, on the principle laid down in *Walker v. Johnston*, 312 U.S. 275, held when a habeas corpus petition raises a material issue of fact the prisoner must be produced and the matter heard by the court.

Waley v. Johnston, 316 U.S., 101.

The foregoing was not appellant's first attempt to obtain consideration in the supreme court. In the October term of 1939, appellant's motion for leave to file petition for writ of habeas corpus was denied.

Ex Parte Harmon Metz Waley, 308 U.S., 528.

5. Upon remand from the supreme court for hearing, the matter was heard on appellant's two contentions, above stated, and was dismissed.

From the order dismissing the writ, appellant again appealed to the court of appeals, and this court affirmed the district's court decision and in the language of headnotes one and two, respectively, of its decision in *Waley v. Johnston*, Dec. 7, 1943, 139 F. 2d, 117, held:

"In habeas corpus proceedings, evidence held to justify District Court's finding that petitioner, in his counsel's presence, voluntarily entered pleas of guilty of kidnapping after being advised

by counsel that his previous confessions, not introduced in evidence, that he took victim into another State, could not be used against him, if secured by intimidation and threats, as he claimed."

"A confession of crime, induced by intimidation and threats, but not introduced in evidence against defendant, cannot give him immunity from result of his free and voluntary pleas of guilty."

In conclusion, this court at page 121, stated:

"The only question on this habeas corpus proceeding is whether the plea of guilty was freely and voluntarily entered. The court found that it was. There is ample evidence to sustain that finding."

Certiorari was denied in *Waley v. Johnston*, February 28, 1944, 321 U.S. 779, and rehearing denied April 3, 1944, 321 U.S., 804.

This denial by the supreme court was followed by appellant's motion in said court to file his petition for a writ of habeas corpus, which motion was denied.

Waley v. Johnston, May 21, 1945, 325 U.S., 835.

And a similar denial was had in the October Term, 1945.

Waley v. Johnston, Warden, 326 U.S., 684.

6. In appellant's further application for a writ of habeas corpus, admittedly his fifteenth in the federal courts of the ninth circuit, appellant set up no

new grounds for relief and the same, on appeal, was held properly denied.

Waley v. Johnston, Warden, 163 F. 2d, 556, Cert. den. Nov. 10, 1947, 332 U.S., 818.

7. The appellant next filed his motion with the trial court to vacate the judgment and set aside the sentence of the United States District Court for the Western District of Washington, Southern Division. This motion was made pursuant to Title 28, U.S.C.A., Section 2255.

On April 18, 1949, the district court, on its own motion, denied the appellant's motion from which order an appeal was taken.

Appellant's contention was to the effect that the indictment did not allege that the victim was unlawfully held at the time of interstate transportation.

Upon the facts alleged as to dates of kidnapping and transportation and failure to release within seven days, this court found no merit in appellant's contention and affirmed the judgment.

Waley v. United States, Dec. 9, 1949, 178 F. 2d, 311, Cert. den. May 29, 1950, 339 U.S., 967.

Appellant in his second motion filed April 20, 1955, and made also pursuant to Title 28, U.S.C.A., Sec. 2255, does not set forth any facts in support of

his accusations against the courts and its officers, but accuses them of "railroading him" to prison for an offense that was never committed.

Appellant also contends and accuses the trial court of being "afraid to mention anything about defendant's *right* to jury trial, for fear that he would demand such *right*, and before all the people, so that defendant could not be so easily railroaded into prison."

The district judge in the trial jurisdiction found not the slightest basis in the record for the assertions in defendant's motion and also found that defendant freely and voluntarily entered a plea of guilty to Counts I and II of the indictment, and by such plea all averments of fact were admitted, that all defenses were waived, the prosecution was relieved from the burden of proving any fact, and jury trial was not required, and because no basis or merit for defendant's motion appeared either in the motion or in the records and files in the case, denied such motion by order entered June 17, 1955.

QUESTION PRESENTED

Was the appellant, upon the motion and the files and records of this case, entitled to another hearing before the trial court?

ARGUMENT AND AUTHORITIES

The pertinent portion of Title 28, U.S.C.A., Sec. 2255, covering the procedure pursuant to motion herein made, are as follows:

* * * * *

“Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States Attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto.”

* * * * *

“A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

“The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.”

In *Barrett v. Hunter*, 180 F. 2d, 510, 514, it is held:

“If the motion and the records and files of the case conclusively show that the prisoner is not entitled to any relief, the court is not required to entertain the motion.”

* * * * *

“But where the motion and any response thereto present material and substantial issues of fact requiring a hearing, generally, in the exercise of sound discretion, the court should require the production of the prisoner.”

In the dissenting opinion in *Barrett v. Hunter*, *supra*, at page 518, it was conceded:

“It is, of course, true that if the record of the trial court affirmatively reveals that his rights to counsel were explained to him, that the court offered to appoint counsel for him, and that he waived the benefit of counsel, that such records are conclusive and that in the face thereof his allegations in the motion in the sentencing court and in the complaint in the habeas corpus action to the contrary do not raise any issues of fact that would entitle him to the right to produce testimony.”

The motion in this instance does not challenge the conviction on facts *dehors* the record, as in *United States v. Hayman*, 342 U.S. 205, or in *Waley v. Johnston*, 316 U.S., 101.

The record in this case, as reported in *Waley v. Johnston*, 139 F. 2d, 117, 119, is conclusive that appellant first waived the assistance of counsel, that the court, nevertheless, appointed counsel for him, and offered to appoint separate counsel, but each, he and his wife, expressed satisfaction with the appointment of single counsel. The record in the case, as reported in *Waley v. Johnston*, *supra*, further shows that:

“Thereupon, the receiving of the pleas was postponed until another date at which time the defendant returned into court with his attorney and again signified his desire to plead guilty which was then accepted in open court and entered of record.”

There was absolutely no objection, claim, nor notice to the court of any alleged conflict between the interest of these defendants, and under the circumstances there was no apparent reason, nor does any appear in the motion or the files and records of the case, why single counsel to represent these defendants was a denial of their constitutional right to effective assistance of counsel.

See *Lott v. U. S.*, 218 F. 2d, 675.

In his fishing expedition for ascertaining further grounds of objections to his conviction, the appellant asserts in his motion and brief his right to a jury trial.

Competent counsel was appointed for appellant to whom he could convey a request for a jury trial. There was no further obligation on the court to advise him of his various rights.

“The appellant had the right to a jury trial. He waived the right when he entered his pleas. ‘A man may effectively by his own voluntary act surrender his liberty or part with his life by pleading guilty. No public policy forbids this, and a defendant’s right so to do is nowhere forbidden by the Constitution.’ *Patton v. United States*, 281 U.S., 276, 281, * * *.”

Bugg v. United States, 140 F. 2d, 848, Cert. den., 323 U.S. 673.

Appellant further asserts his right to the death penalty under the statute, which he states was impos-

sible where there was no jury allowed the defendant. (Appellant's Brief, page 9).

Aside from the matter of waiver, the issue is academic, moot and without merit.

The appellant knowingly and voluntarily pleaded guilty to an offense which he now claims he did not commit. It is the appellee's contention that any question of appellant's guilt or innocence, including the matter of interstate transportation, is foreclosed by the judgment and conviction.

U. S. ex rel Simkoff v. Mulligan, U. S. Marshal,
67 F. 2d, 321;

Blair v. White, Warden, 24 F. 2d, 323;

Levin v. U. S., 5 F. 2d, 598;

Brady v. U. S., 24 F. 2d, 399.

In addition, this court has already determined that the indictment to which appellant pleaded guilty charged a federal offense of kidnapping.

Waley v. U. S., 178 F. 2d, 311, 312.

Each of the cases cited by appellant on page 10 of his brief has to do with the necessity of corroborative proof in support of extrajudicial confession introduced in evidence. Appellant fails to distinguish between the use of such confessions and the voluntary plea of guilty entered in his case.

The appellant would proceed upon the theory that Section 2255 of Title 28, U.S.C.A., was enacted to afford him the opportunity to raise any nature of question directed to errors in his trial. It was neither intended to encompass all such issues, nor to impinge upon prisoners' rights of collateral attack upon their convictions.

"On the contrary, the sole purpose was to minimize the difficulties encountered in habeas corpus hearings by affording the *same rights* in another and more convenient forum." (Italics ours).
United States v. Hayman, supra.

The courts have stated its purpose more in detail as follows:

"This section relating to motion to vacate, set aside or correct sentence does not give a prisoner the right to obtain a review, first by the court imposing the sentence and then on appeal from denial of motion to vacate, of errors of fact or law that must be raised by timely appeal, and purpose of this section was not to confer a broader right of attack on judgment and sentence than might theretofore have been made by habeas corpus, but was rather to provide that attack which theretofore might have been made in some other court though resort to habeas corpus must now be made by motion in sentencing court, unless it shall appear that remedy by motion is inadequate or ineffective to test legality of prisoner's detention."

Barnes v. Hunter, 188 F. 2d, 86, Cert. den., 342 U.S. 920.

See, to the same effect, following cases:

Masi v. U. S., 223 F. 2d, 132;

Osborne v. Looney, 221 F. 2d, 254;

Butler v. Looney, 219 F. 2d, 146;

Smith v. U. S., 205 F. 2d, 768;

Kahl v. U. S., 204 F. 2d, 864;

Mills v. Hunter, 204 F. 2d, 468;

Kreuter v. U. S., 201 F. 2d, 33;

Clough v. Hunter, 191 F. 2d, 516;

Crow v. U. S., 186 F. 2d, 704;

Hastings v. U. S., 184 F. 2d, 939;

U. S. v. Gallagher, 183 F. 2d, 342;

Davilman v. U. S., 180 F. 2d, 284;

U. S. v. Newman, 126 F. Supp., 94;

Also,

Jones v. Squier, 195 F. 2d, 179, and

Winhoven v. Swope, 195 F. 2d, 181.

CONCLUSION

For the foregoing reasons, the order of the district court denying defendant's motion to set aside the conviction, judgment, sentence, and commitment, was correct and should be affirmed.

Respectfully submitted,

CHARLES P. MORIARTY
United States Attorney

GUY A. B. DOVELL
Assistant United States Attorney
Attorneys for Appellee

No. 14874

United States
Court of Appeals
for the Ninth Circuit

CHARLES W. HOFFRITZ,

Appellant,

vs.

UNITED STATES OF AMERICA, LAUGHLIN
E. WATERS, United States Attorney, and IR-
WIN R. WEISS,

Appellees.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California,
Central Division.

FILED

JAN - 3 1955

WILLIAM E. ORDEN, CLERK

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[Clerk's Note: When deemed likely to be of an important nature. errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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600 Federal Building,
Los Angeles 12, California.

In the United States District Court in and for the
Southern District of California, Central Division

No. 17721-WM

CHARLES W. HOFFRITZ,

Plaintiff,

vs.

UNITED STATES OF AMERICA, LAUGHLIN
E. WATERS, United States Attorney, and IR-
WIN R. WEISS,

Defendants.

COMPLAINT FOR TEMPORARY RESTRAIN-
ING ORDER AND INJUNCTION—SUP-
PRESSION OF EVIDENCE, AND DE-
MAND FOR JURY TRIAL

To the Honorable Judge of the United States Dis-
trict Court, for the Southern District of Cali-
fornia, Central Division:

The Complaint of Charles W. Hoffritz against
the United States of America, Laughlin E. Waters,
United States Attorney, and Irwin R. Weiss, and
for cause of action for suppression of evidence, re-
straining order, and injunction, alleges:

I.

That the plaintiff now is and during all times
herein mentioned was a resident of the County of
Los Angeles, State of California, and residing
within the jurisdiction of the above-entitled court.

II.

That the defendant Laughlin E. Waters now is
and during all times herein mentioned was the duly

constituted United States Attorney for the Southern District of California, Central Division. [2]

III.

That the defendant Irwin R. Weiss, at all times herein mentioned was and is a special agent employed by the United States Treasury Department, Internal Revenue Service.

IV.

That this is a civil action arising under the Constitution of the United States for the suppression of evidence and return of all books, papers, documents, and records, obtained by and through defendant Irwin R. Weiss, of the United States Treasury Department, Internal Revenue Service, which evidence the plaintiff alleges was obtained from him by fraud, deceit, trickery, and device, being, as hereinafter set forth, an illegal search and seizure, in violation of the plaintiff's constitutional rights under the Fourth and Fifth Amendments of the Constitution of the United States, and the Court has jurisdiction of the parties and the subject matter under and by virtue of Sections 1331-1358, Title 28, U.S.C.

V.

That the defendant Irwin R. Weiss knew prior to the time that he obtained permission from the plaintiff to inspect his books and records that the purpose of his investigation was to obtain evidence for a contemplated criminal proceedings. The defendant Irwin R. Weiss fraudulently and deceitfully,

***Page numbering appearing at foot of page of original Certified Transcript of Record.**

with intent to deceive, and mislead plaintiff for the purpose of obtaining the plaintiff's consent to inspect his books and records for the years commencing 1947, represented to the plaintiff, prior to obtaining his permission to inspect the books and records, that the defendant Irwin R. Weiss desired to recheck the plaintiff's individual books and records for the years 1947 and 1948, which had been previously audited by another revenue agent who made changes in the computation by capitalizing the cost of the trade name which had been expended, allocating a part of the building account to the value of the land, no previous land [3] allocation having been made, and disallowing certain improvements on a building which had been expended instead of capitalizing, all of which were civil adjustments, and upon which the plaintiff had paid the tax, and no civil fraud penalties had been assessed, the deficiency in 1947 being \$10.01, and for the year 1948, \$2,916.73, plus interest of \$563.28, or a total of \$3,480.01, all of which had been paid on July 10, 1950. That the said representations were false and were then and there known by the defendant Irwin R. Weiss to be false. That in truth and fact the defendant Irwin R. Weiss knew that if he advised the plaintiff that it was his purpose to obtain the plaintiff's books and records for a contemplated criminal proceedings, that the plaintiff would not give his consent to an inspection of his individual books and records. That the plaintiff believed and relied upon the said representations, and was there-

by induced to waive his constitutional rights, having no knowledgeable choice between relying upon his constitutional rights and waiving them, and granted the defendant Irwin R. Weiss permission to inspect his books and records for the purpose of rechecking them only. That thereafter the said Irwin R. Weiss made a transcript of the books and records, checks, receipts, invoices, for the years 1947 to 1951, inclusive. That at no time did the defendant Irwin R. Weiss inform or advise the plaintiff of his true purpose, nor did he advise him of his constitutional rights. Plaintiff further alleges that if the defendant Irwin R. Weiss had advised him of his constitutional rights and the true purpose of the intended investigation, the plaintiff would not have granted the defendant Irwin R. Weiss permission to inspect his books and records and make copies thereof.

VI.

That the plaintiff is informed and believes that defendant Laughlin E. Waters intends to present some or all of the evidence which was illegally seized from the plaintiff in violation of his [4] constitutional rights through defendant Irwin R. Weiss, to the United States Grand Jury for the current term, for the purpose of obtaining an indictment or complaint before the Commissioner of this Court against the plaintiff charging him with income tax evasion in violation of Section 145(b) of Title 26, U.S.C. and Excise Tax Section 2400 of Title 26, U.S.C., and Excise Tax Section 2400 of Title 26, tation.

VII.

That by reason of said alleged illegal search and seizure in violation of plaintiff's constitutional rights under the Fourth and Fifth Amendments under the Constitution of the United States, the United States of America, by and through its agents Laughlin E. Waters and Irwin R. Weiss, should be required to return to the plaintiff all transcripts of books, papers, documents, records and information obtained therefrom, and that the defendants United States of America, United States Attorney Laughlin E. Waters, Irwin R. Weiss, their servants, agents, employees, and assistants, be restrained from bringing before the United States Grand Jury or in any criminal proceedings before the Commissioner of this Court, such illegally obtained evidence, or information obtained therefrom.

VIII.

That irreparable injury and hardship will be caused to the plaintiff if the United States Grand Jury were to indict him upon the illegally seized evidence which was obtained in the manner described herein, or if a complaint were issued by the Commissioner of this Court.

Wherefore, plaintiff prays:

1. That the defendants, their agents, servants, and attorneys, and all persons in active participation with them, be perpetually enjoined from presenting any and all of the evidence illegally obtained from the plaintiff, and all information obtained therefrom, to the United States Grand Jury, and

in any criminal proceeding [5] whatsoever, and that pending a final determination of the cause, a preliminary injunction issue restraining said defendants from each of said acts.

2. That this Court issue a temporary restraining order restraining the defendants and each of them, their agents, servants, and attorneys, and each of them, until the hearing upon said order from doing any of the acts mentioned in Paragraph 1 of this prayer for relief, and that this Court issue its preliminary injunction restraining the defendants herein named, and each of them, from doing any of the said acts until the entry of the Court's final judgment herein.

3. Suppress all evidence obtained as a result of the illegal means used to obtain the books and records of the plaintiff, and order the return of all transcripts and copies of records, books, invoices, checks, and other physical records and objects to the plaintiff or such other persons as may be lawfully entitled thereto.

4. For such other and further relief as to the Court may seem just.

/s/ BERNARD B. LAVEN,
Attorney for Plaintiff.

A jury trial is demanded by plaintiff on all issues.

/s/ BERNARD B. LAVEN,
Attorney for Plaintiff.

Duly verified.

[Endorsed]: Filed January 4, 1955. [6]

[Title of District Court and Cause.]

MOTION FOR PRELIMINARY AND
· TEMPORARY INJUNCTION

Plaintiff moves the Court to grant a temporary and preliminary injunction against the defendant United States of America, its agents, servants, and attorneys, and all persons in active participation with them, pending a final determination of this action, and until further order of Court, restraining them from presenting to the United States Grand Jury or to the Commissioner of this Court or in any criminal proceedings, any and all of the information obtained from the individual books, records, and documents obtained by the defendant Irwin R. Weiss from the plaintiff by reason of the said illegal search and seizure. That unless restrained by this Court, defendants will commit the acts referred to, which will result in irreparable injury to the plaintiff, as more fully appears from the Affidavit of Charles W. Hoffritz and the Complaint on file herein, and by this reference made a part hereof.

Dated: January 4, 1955.

/s/ BERNARD B. LAVEN,
Attorney for Plaintiff.

[Endorsed]: Filed January 4, 1955. [8]

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF MOTION FOR
TEMPORARY AND PRELIMINARY IN-
JUNCTION

State of California,
County of Los Angeles—ss.

Charles W. Hoffritz, being first duly sworn, deposes and says:

That he is the plaintiff in the above-entitled action. That this is an action for a temporary restraining order, injunction and suppression of evidence for the reason that the defendant Irwin R. Weiss, Special Agent of the United States Treasury Department, Internal Revenue Service, obtained from the affiant by fraud, deceit, trickery, and device an inspection of his individual books and records. That affiant is informed that the defendant Irwin R. Weiss knew that if he advised the affiant that it was his purpose to obtain an inspection of affiant's books and records in connection with a contemplated criminal proceedings, that the affiant would not give his consent to said inspection. That affiant is informed that [9] at said time the defendant Irwin R. Weiss intended to make an investigation for the purpose of obtaining evidence for a contemplated criminal proceedings, which information had been furnished to him by one Dorothy Varble, an informer and an employee bookkeeper of the affiant. That in order to obtain the affiant's consent, defendant Irwin R. Weiss fraudulently

and deceitfully represented to the affiant that the purpose of the inspection was to recheck the affiant's individual books and records for 1947 and 1948, which had been previously audited by Revenue Agent Forrest Calkins. That affiant was aware of the fact that the previous audit did not disclose any matters of civil or criminal fraud, but were merely civil adjustments, and for the year 1947 the deficiency amounted to only \$10.01, and for the year 1948 amounted to \$2,916.73 plus interest, all of which had been paid on July 10, 1950.

The representations made by the defendant Irwin R. Weiss were false, and were then and there known by him to be false, and that affiant relied upon the representations and was thereby induced to consent to the inspection, having no knowledgeable choice between relying upon his constitutional rights and waiving them.

That the affiant is informed and believes that the defendant United States Attorney Laughlin E. Waters will present through the defendant Irwin R. Weiss the information and transcripts of the books and records obtained by him to the United States Grand Jury, before the 12th day of January, 1955, as well as information obtained therefrom, for the purpose of obtaining an indictment against the affiant, or a complaint from the Commissioner of this Court, in violation of Section 145(b) of Title 26, U.S.C., and Excise Tax Section 2400 of Title 26, U.S.C., unless this Court will restrain such presentation of evidence. That unless, pending

hearing on an Order to Show Cause why a Preliminary Injunction should not be issued, a temporary restraining order is granted by this Court, the affiant will be indicted or a complaint will be issued against him [10] before the hearing upon the Preliminary Injunction can be had, and defendants will have committed the action sought to be restrained.

That affiant hereby refers to the Complaint herein, and makes the same a part hereof by reference as though fully set forth.

Wherefore, affiant prays that this Court issue a temporary injunction, restraining each of the defendants herein named, their attorneys, agents, servants, and employees from doing any of the acts hereinabove set forth, until a hearing upon an Order to Show Cause why a Temporary Restraining Order should not be issued can be had.

/s/ CHARLES W. HOFFRITZ.

Subscribed and sworn to before me this 4th day of January, 1955.

[Seal] /s/ BERNARD B. LAVEN,
Notary Public in and for the Said County and
State.

[Endorsed]: Filed January 4, 1955. [11]

In the United States District Court in and for the
Southern District of California, Central Division

No. 17721—WM

CHARLES W. HOFFRITZ,

Plaintiff,

vs.

UNITED STATES OF AMERICA, LAUGHLIN
E. WATERS, United States Attorney, and IR-
WIN R. WEISS,

Defendants.

ORDER TO SHOW CAUSE AND TEMPORARY
RESTRAINING ORDER

Upon motion of the plaintiff and upon reading and filing the verified complaint of plaintiff in this action, and the Affidavit of the plaintiff, and good cause appearing therefor,

It is Hereby Ordered that the defendant United States of America, by and through its agents, Laughlin E. Waters, United States Attorney, and Irwin R. Weiss, Special Agent of the Treasury Department, Internal Revenue Service, be and appear before this Honorable Court on the 10th day of January, 1955, at the hour of 10 o'clock a.m., then and there to show cause, if any they have, why they and their agents, servants, employees, and attorneys should not be enjoined and restrained during the pendency [19] of this action or until further order of Court from presenting any and all information and evidence obtained from the

books, records, papers, and documents belonging to the plaintiff, and all transcripts of books, papers, documents and records obtained from the plaintiff by reason of the alleged illegal search and seizure, to the United States Grand Jury, or to the Commissioner of this Court, or in any criminal proceeding.

It Is Further Ordered that a copy of the Complaint, the Affidavit of Charles W. Hoffritz, together with Points and Authorities, be served on the defendant Laughlin E. Waters, United States Attorney, and defendant Irwin R. Weiss, Special Agent of the Treasury Department, Internal Revenue Service, not later than the 5th day of January, 1955.

Dated: January 4, 1955.

/s/ WM. C. MATHES,

Judge of the United States
District Court.

[Endorsed]: Filed January 4, 1955. [20]

[Title of District Court and Cause.]

AFFIDAVIT IN OPPOSITION TO MOTION
FOR INJUNCTION AND/OR MOTION TO
SUPPRESS EVIDENCE

United States District Court,
Southern District of California—ss.

Irwin R. Weiss, being first duly sworn, deposes and says:

(1) That I am employed as a special agent of the Intelligence Division, Internal Revenue Service, 417 South Hill Street, Los Angeles, California; that I have been employed in this capacity since February 1, 1946;

(2) That I was assigned on April 7, 1953, to conduct a preliminary investigation of the income tax liability of Charles W. Hoffritz, d.b.a. Glo-Dial Clock Company, 922 West 23rd Street, Los Angeles, California;

(3) That pursuant to such assignment I presented myself at the office of the Glo-Dial Clock Company on April 14, 1953, at [21] approximately 9:00 a.m.; that I asked for Mr. Hoffritz and was told by Mrs. Dorothy Varble that he (Mr. Hoffritz) had not arrived at the office, but should arrive shortly; that I showed Mrs. Varble my credentials and stated that I was assigned to conduct an investigation of Mr. Hoffritz's income tax returns, and that I would await the arrival of Mr. Hoffritz;

(4) That Mrs. Varble offered to call Mr. Hoffritz at his (Mr. Hoffritz's) home on the possibility that he was still there, which was done; that I told Mr. Hoffritz (over the telephone) that I was assigned to conduct an investigation of his income tax liabilities; that Mr. Hoffritz informed me that I could have all of his books and records for examination and to inform his bookkeeper, Mrs. Varble, of this; I, however, requested Mr. Hoffritz to personally make known his desires in this connection.

After I had so requested Mr. Hoffritz, I again turned the telephone over to Mrs. Varble and asked her if she would take a message from Mr. Hoffritz.

(5) Mrs. Varble then showed me to a small office and handed me two binders which appeared to contain general ledger sheets and journals. I started to examine these records and was doing so when a man who I had later identified to me as Charles W. Hoffritz arrived. Mr. Hoffritz arrived at about 10:30 or 11:00 o'clock of that same morning. Mr. Hoffritz saw that I was working at the records Mrs. Varble had previously given to me and I told Mr. Hoffritz that I was from the Bureau of Internal Revenue and was conducting an investigation of his income tax liabilities for the years 1948 through 1951. I also showed to Mr. Hoffritz my credentials which is a leather bound identification case showing that I was a Special Agent of the Treasury Department of the Internal Revenue and which contained my picture and my signature. I still have this case and it is substantially the same excepting the portion referring to me as a "Special Agent" has been brought to date, but in all [22] other respects it clearly indicated what my capacity then was and now is. Mr. Hoffritz took these credentials in his hand and appeared to examine them;

(6) At no time did Mr. Hoffritz state that he had any objections to me examining any of his books and records, in fact, during the course of the two or three weeks that I worked in examining

records at his place of business he, Mr. Hoffritz, frequently would talk to me. He was very friendly and told me that if there were any records that I wanted to look at for me to just ask and he would try to produce them. In this connection, Mr. Hoffritz asked Mrs. Varble to turn over to me his personal stock record ledger and Mrs. Varble did turn this over to me and I used it in my examination. Mr. Hoffritz also instructed Mrs. Varble to get from the safe that she maintained, his personal bank records, such as his duplicate deposit slips, bank statements, and cancelled checks and these, in the presence of Mr. Hoffritz, were also turned over to me and I examined them;

(7) The course of my examination of Mr. Hoffritz's records was primarily that of any accountant. I made transcripts from his records;

(8) In the course of the days that I was at Mr. Hoffritz's place of business he asked me whether my audit would cover the year 1952 and I told him "No" because I had not as yet been able to get the original of his return for that year from the Bureau as it was being processed. After which Mr. Hoffritz said he had his copy and inquired if I couldn't work from it. I told him that would be satisfactory and Mr. Hoffritz then asked Mrs. Varble to get his copy of his return for the year 1952 and make me a copy, which Mrs. Varble did and she supplied me with the copy which I still retain in the investigative file;

(9) That during the audit, I requested certain records [23] applicable to the years prior to 1948 of Mr. Hoffritz; Mr. Hoffritz inquired of the reason for this request, in that he claimed that Internal Revenue Agent Forrest Calkins had checked him for these years; that I told him that if he had any objection, the request would be withdrawn; Mr. Hoffritz then stated that he had no intention to withhold any records and these records were also made available by Mr. Hoffritz;

(10) That during the investigation of the case at the office of the Glo-Dial Clock Company, which took place almost daily between April 14, 1953, and May 1, 1953, Mr. Hoffritz made several visits daily into the office assigned to me and voluntarily discussed various topics, such as prior audits by the Internal Revenue Service, his family, and life history; and that, in addition he (Mr. Hoffritz) expressed satisfaction that this investigation appeared to be so thorough and was being brought up to date;

(11) That at no time did your affiant attempt to, or in fact, deceive or misrepresent to Mr. Hoffritz his capacity as a Special Agent of the Bureau of Internal Revenue, but in fact did fully inform Mr. Hoffritz on several occasions that your affiant was directed to investigate Mr. Hoffritz's tax obligations for the period commencing with the year 1948 through 1951, and your affiant fully believes that Mr. Hoffritz was willing to and most voluntarily turned over to your affiant for inspection all

the books and records that your affiant reviewed and inspected during the course of his stay in Mr. Hoffritz's office and place of business;

(12) That your affiant endeavored to reconcile the business records of Mr. Hoffritz's business with the returns that Mr. Hoffritz had filed for the years 1948 through 1952, and found that Mr. Hoffritz's records did substantially coincide and could be reconciled with such returns. That by further and additional investigation conducted by your affiant outside of the books and records made available by Mr. Hoffritz, it was ascertained that considerable [24] additional income of a taxable nature was received and earned by Mr. Hoffritz for the taxable years 1948 through 1952 which was not reported nor reflected in the returns, the subject of this investigation, and upon which no tax had been paid up to and including the date of the investigation of April 14, 1953;

(13) That your affiant now directs his attention to page 2, line 10, of the Affidavit of Charles W. Hoffritz pertaining to the statement of a previous audit for the years 1947 and 1948. At the time I was conducting my investigation I was not assigned to concern myself with such alleged audit. However, since examining Mr. Hoffritz's Affidavit I have caused to be checked, and did in fact check the Los Angeles records of the Internal Revenue Bureau and found that such records reflect the following: That a prior audit was conducted by Internal Revenue Agent Forrest Calkins for the

years 1945 through 1947, that the results of this audit showed additional taxes plus interest due from Mr. Hoffritz for those years as follows:

1945 Additional taxes and interest..total	\$ 97.14
1946 Additional taxes and interest...total	3480.01
1947 Charles W. Hoffritz additional	
taxes and interest.....total	29.82
1947 Mrs. Doe Hoffritz additional	
taxes and interest.....total	11.54

(14) That all payments on the above additional assessments were made to the Collector of Internal Revenue, according to the records, for all such years on July 11, 1950, with the exception of Mrs. Doe E. Hoffritz's liability for 1947, which was paid on September 25, 1950;

(15) That shortly after I had commenced working on the books and records provided to me by Mr. Hoffritz, namely, within a few days after April 14, 1953, a gentleman was introduced to me by Mr. Hoffritz, by the name of Ward A. Faora. Mr. Hoffritz stated that [25] this man was a C.P.A. who was employed by him in the capacity of an outside auditor and in substance told Mr. Faora that I was from the Bureau of Internal Revenue checking on his income tax returns and records, during which time I had Mr. Hoffritz's books and personal business records laid out on the table in the office which had been assigned for me to work in, and this gentleman, Mr. Faora, stated that he had prepared several of Mr. Hoffritz's income tax returns.

Mr. Hoffritz told me that if I needed any help that I could call upon Mr. Faora to help me in my work;

(16) That at no time did affiant state to Mr. Hoffritz that the purpose of the inspection was to recheck Mr. Hoffritz's individual books and records for 1947 and 1948, but did at all times state that the purpose of affiant's investigation pertained to Mr. Hoffritz's income tax liabilities for the years 1948 through the year 1951, which was later supplemented to include the year 1952, upon the request of Mr. Hoffritz.

/s/ IRWIN R. WEISS.

Subscribed and Sworn to before me this 12th day of January, 1955.

EDMUND L. SMITH,
Clerk, United States District
Court.

By /s/ MAXINE LEWIS,
Deputy.

[Endorsed]: Filed January 13, 1955. [26]

[Title of District Court and Cause.]

AFFIDAVIT IN OPPOSITION TO MOTION
FOR INJUNCTION AND/OR MOTION TO
SUPPRESS EVIDENCE

United States District Court,
Southern District of California—ss.

Mrs. Dorothy Varble being first duly sworn, deposes and says:

(1) That she was heretofore employed by Charles W. Hoffritz, at his place of business known as Glo-Dial Clock Company, 922 West 23rd Street, Los Angeles, California, as the full charge book-keeper of the said Mr. Hoffritz's business for a period of approximately five years prior to her resignation, during the month of July, 1953.

(2) That during the course of her employment and commencing from about the beginning of same, she was told by Charles W. Hoffritz, hereinafter referred to as Mr. Hoffritz, to fully cooperate and make available all of his records to any authorized Government official, [27] namely, as to representatives of the State, with reference to sales tax, and as to representatives of the City, with reference to sales tax, when such tax became effective, and with any representative of the Federal Government who sought to view his records respecting any excise tax that might be due, and as to any income tax investigation that might be conducted. Your affiant recalls that Mr. Hoffritz has upon many occasions during her employment stated that all of his records

should be made available for inspection for any such official agents.

(3) That on or about April 14, 1953, a man who your affiant has later had identified to her as Irwin R. Weiss, came to such place of business about the hour of 8:30 a.m., and stated that he would like to see Mr. Hoffritz. I told Mr. Weiss that Mr. Hoffritz was not in and probably would not be in his office for some little time. I asked Mr. Weiss what he wanted and he told me he was from the Bureau of Internal Revenue and he showed me his credentials, and stated that he was there to check Mr. Hoffritz's income tax liabilities, to which I responded "O.K.," I can give you the books. To which Mr. Weiss stated "No, I do not want to look at any of Mr. Hoffritz's records unless Mr. Hoffritz consents for me to do so." I then stated that I would call Mr. Hoffritz on the phone, as maybe I could catch him before he had left home. I then put in a call to Mr. Hoffritz's home where I talked to Mr. Hoffritz, whose voice I clearly recognized. I told Mr. Hoffritz that there was a Government agent from the Bureau of Internal Revenue in the office who wanted to look at his books with regard to his income tax, to which Mr. Hoffritz said: "Give him what he wants." I turned to Mr. Weiss and told Mr. Weiss what Mr. Hoffritz had said. Mr. Weiss said, "Let me talk to him." Mr. Weiss then picked up the speaker of the phone and I heard him say to Mr. Hoffritz that he was an Agent from the Bureau of Internal Revenue and would like to be able to examine his (Mr. Hoffritz's) books and records for

the purpose of checking his income [28] tax liabilities. After Mr. Weiss had spoken to Mr. Hoffritz, he, Mr. Weiss, turned over the phone to me, but before doing so Mr. Weiss had said that he wanted Mr. Hoffritz to tell me what to do. I then again spoke to Mr. Hoffritz on the telephone and was instructed by Mr. Hoffritz to give Mr. Weiss whatever he wanted and to make him comfortable.

(4) After the above, I showed Mr. Weiss to a small office which I told him he could use. I then gave to Mr. Weiss two binders one of which contained the journals from approximately 1944 through 1952, and the other the general ledger sheets for the same period for the business owned by Mr. Hoffritz, known as the Glo-Dial Clock Company. That is all the records I gave Mr. Weiss on that occasion.

(5) About an hour or two later Mr. Hoffritz came to the place of business. I saw Mr. Hoffritz go direct to the office where Mr. Weiss was sitting and he appeared to have a conversation with Mr. Weiss, but I did not hear it, except that I heard audible sounds. After the above, I saw that Mr. Weiss stayed at the place of business for about the remainder of the day. Mr. Weiss appeared to be going over some records. I paid very little attention to what he was actually doing. Mr. Hoffritz, if my memory serves me right, was also there the biggest part of the day. I observed that he appeared to be talking to Mr. Weiss from time to time.

(6) Shortly after Mr. Weiss had first come to the office on April 14, 1953, Mr. Hoffritz called to me and said: "Dorothy (Dorothy being my first name and the name he used when he wanted me), give him (referring to Mr. Weiss) anything he wants." Following the first day that Mr. Weiss came, Mr. Weiss continued to come to the same place of business for a period of two or three weeks. He would sometimes stay for a few hours and other times all day. I saw him working upon various books and documents but paid no particular attention as to just what he was working upon. During this period [29] I saw Mr. Hoffritz frequently go into the office where Mr. Weiss was working and appear to be talking to Mr. Weiss. During the period Mr. Weiss was working on the records at Mr. Hoffritz's place of business, I recall upon one occasion Mr. Hoffritz asking Mr. Weiss if he, Mr. Weiss, was going to work upon his 1952 income tax return, and as I recall Mr. Weiss said he had been unable to obtain from the Bureau the return for that year. After which, Mr. Hoffritz said, "Dorothy, get my copy of the return for 1952, and make a copy for Mr. Weiss." I went and got Mr. Hoffritz's 1952 return and made a copy of it and gave it to Mr. Weiss as Mr. Hoffritz had told me to do. During this period, that Mr. Weiss was at the office, I recall that upon one occasion Mr. Hoffritz said that he wanted to get the matter cleared up to date.

(7) While Mr. Weiss was working at the office, I saw Mr. Hoffritz himself turn over to Mr. Weiss

other personal finance records that Mr. Hoffritz personally kept in his desk. One of these was a ledger containing Mr. Hoffritz's stock transactions. And upon another occasion I followed Mr. Hoffritz's direction and went to the safe where were kept the business records and because Mr. Hoffritz told me to do so, I turned over the duplicate deposit slips, bank statements and cancelled checks of Mr. Hoffritz's personal bank account to Mr. Weiss.

(8) During the two- or three-week period that Mr. Weiss came nearly every day to the place of business, I at no time heard Mr. Hoffritz object to Mr. Weiss inspecting any of the business or personal records owned by Mr. Hoffritz. In fact, at all times Mr. Hoffritz appeared to be anxious to accommodate Mr. Weiss and told me that I should accommodate Mr. Weiss as far as was possible.

(9) From time to time while Mr. Weiss was there, he, Mr. Weiss, would ask me to help him interpret or explain various entries. Mr. Hoffritz had told me that I should fully cooperate with Mr. [30] Weiss and give him all the help I could and I did from time to time, when asked by Mr. Weiss, interpret and explain entries in the books and records.

(10) The first time I learned that Mr. Weiss was a Special Agent of the Bureau of Internal Revenue was towards the end of the audit being conducted of Mr. Hoffritz's business by Mr. Weiss, when Mr. Hoffritz asked me, whether or not I knew that Mr. Weiss was a "Special Agent" of the Bureau of Internal Revenue? I said I did not, and Mr. Hoffritz

replied: "Well, he is." This conversation took place during the last week of April, 1953.

/s/ DOROTHY VARBLE.

Subscribed and Sworn to before me this 12th day of January, 1955.

EDMUND L. SMITH,

Clerk, United States District
Court.

By /s/ MAXINE LEWIS,

Deputy.

[Endorsed]: Filed January 13, 1955. [31]

[Title of District Court and Cause.]

NOTICE OF MOTION TO STRIKE
DEMAND FOR JURY

To the Plaintiff Above Named and to Bernard B.
Laven, His Attorney:

You and Each of You Will Please Take Notice that the above-named defendants, by and through the undersigned, will bring the following Motion to Strike Demand for Jury, under Rule 12(f), Federal Rules of Civil Procedure, on for hearing before the above-entitled Court in the Courtroom of the Honorable Wm. C. Mathes, United States District Judge, in the United States Post Office and Court-house Building, 312 North Spring Street, Los Angeles, California, on Monday, the 24th day of Janu-

ary, 1955, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard.

Dated: This 17th day of January, 1955.

LAUGHLIN E. WATERS,
United States Attorney;

MAX F. DEUTZ,
Assistant United States At-
torney, Chief of Civil Div.

/s/ CECIL HICKS, JR.,
Assistant United States Attorney, Attorneys for
Defendants. [33]

[Title of District Court and Cause.]

MOTION TO STRIKE DEMAND FOR JURY

Come Now the defendants above named, by and through their attorneys, Laughlin E. Waters, United States Attorney; Max F. Deutz, Assistant United States Attorney, Chief of Civil Division, and Cecil Hicks, Jr., Assistant United States Attorney, and without waiving their right to file an answer to the Complaint for Temporary Restraining Order and Injunction, Suppression of Evidence, and Demand for Jury Trial, herein, moves the Court for an order striking the demand for jury trial from the said Complaint herein, pursuant to Rule 12(f), Federal Rules of Civil Procedure, on the ground that such demand is immaterial.

This Motion is based upon and will be presented upon the said Complaint for Temporary Restraining Order and Injunction filed herein by the plaintiff, these Motion papers, and Memorandum of Points and Authorities in Support of Motion to Strike Demand for Jury, together with all the records and files previously filed herein by the respective parties hereto.

LAUGHLIN E. WATERS,
United States Attorney;

MAX F. DEUTZ,
Assistant United States Attorney, Chief of Civil
Division;

/s/ CECIL HICKS, JR.,
Assistant United States Attorney, Attorneys for De-
fendants.

Affidavit of Service by Mail attached.

[Endorsed]: Filed January 17, 1955. [34]

[Title of District Court and Cause.]

AFFIDAVIT OF CHARLES W. HOFFRITZ IN
OPPOSITION TO AFFIDAVITS OF
IRWIN R. WEISS AND DOROTHY VAR-
BLE

State of California,
County of Los Angeles—ss.

Charles W. Hoffritz, being first duly sworn, de-
poses and says:

That the affiant has read the Affidavits of Irwin R. Weiss and Dorothy Varble filed in opposition to the Motion for Injunction.

Reply to Affidavit of Irwin R. Weiss

With reference to the statements in Paragraph 3, the affiant does not have any personal knowledge of the statements therein made, and upon that basis denies each and every statement and allegation therein contained. With reference to the statements in Paragraph 4, to wit: "that I told Mr. Hoffritz (over the telephone) that I was assigned [39] to conduct an investigation of his income tax liabilities; "the affiant denies the said statement, and in opposition thereto alleges that Mr. Weiss said that he wanted to look at the books for 1947 and 1948 again. Affiant further denies that he informed Mr. Weiss that he could have all of his books and records for examination and to inform his book-keeper, Mrs. Varble, of this.

With reference to the statements in Paragraph 5, the affiant alleges in opposition thereto, that he went into the small office where Mr. Weiss was and introduced himself and saw that Mr. Weiss had a ledger before him and assumed that it was for the years 1947 and 1948. Mr. Weiss did not at that time or any other time state to affiant that he was from the Bureau of Internal Revenue and was conducting an investigation of affiant's income tax liabilities for the years 1948 to 1951, nor did he at that time or any other time show the affiant any

credentials, nor did affiant at that time or any other time examine Mr. Weiss' credentials. That affiant assumed that by reason of the instructions that he had given Mrs. Varble that she had given Mr. Weiss the ledger which concerned only the years 1947 and 1948. With reference to all the other statements in said paragraph, affiant does not have any personal knowledge of said statements, and therefore denies them on that ground.

With reference to the statements in paragraph 6, the affiant states that he assumed at all times that the audit which Mr. Weiss was making had reference to 1947 and 1948, and did not at any time have any knowledge of an audit by Mr. Weiss of any other years. That the information which was turned over to Mr. Weiss had reference to the years 1947 and 1948, and in view of the fact that the Revenue Agent, Forrest Calkins, who had previously made an audit of 1947 and 1948, had resolved all of the questions of liability by certain civil technical adjustments, affiant assumed that Mr. Weiss' examination was for civil purposes, because affiant was not at any time advised that Mr. Weiss' purpose was otherwise. [40]

With reference to the statements in paragraph 7, the affiant has since learned that Mr. Weiss is not an accountant, but is a special agent for the Bureau of Internal Revenue, whose primary purpose is to procure evidence for a criminal fraud prosecution, and that the work of accountants is done by a revenue agent such as Forrest Calkins, who made the previous examination.

With reference to the statements in paragraph 8, the affiant denies each and every statement therein made, and the only conversation which he remembers relative to the 1952 return was that he was asked if he had a copy.

With reference to the statements in paragraph 9, affiant admits that he stated that Mr. Forrest Calkins had checked him for the years 1947 and 1948, and that Mr. Weiss had stated that he wanted to check those records again. With reference to all other statements in said paragraph, the affiant denies each and every one of them.

With reference to paragraph 10, the affiant admits that he saw Mr. Weiss at various times and gave him certain information regarding the fact that Mr. Forrest Calkins had spent considerable time making an audit of his books and made certain minor technical adjustments. With reference to all other statements in said paragraph, affiant denies each and every one of them.

With reference to the statements in paragraph 11, the affiant states that Mr. Weiss knew at the time that he requested the affiant's books and records that it was his purpose to obtain evidence for a criminal prosecution, and that he did not inform me of that fact, and that had he so advised me I would not have given my permission for him to look at my books and records for 1947 and 1948, and that I was further misled by the fact that Mr. Calkins had made his audit and made some technical civil adjustments, upon which I had paid the

tax. At no time was I willing to turn over the books to Mr. Weiss or anyone else for the purpose [41] of making a criminal investigation, and Mr. Weiss at all times led me to believe that he was rechecking the audit which had been made by Mr. Calkins.

With reference to paragraph 12, the books and records were kept by the bookkeeper under the supervision of a certified public accountant, and affiant at all times believed that they were correct. That Dorothy Varble had been a bookkeeper and trusted employee of the affiant since 1948. Affiant is informed and believes that Dorothy Varble, for the purpose of obtaining an informer's fee and obtaining control of the affiant's business with her husband, who was the affiant's superintendent, had informed the Bureau of Internal Revenue of certain alleged irregularities which she herself had committed, prior to the time that Mr. Weiss made his request, and that Mr. Weiss knew at the time that he talked to the affiant on the telephone that the purpose of his investigation was to obtain evidence for a criminal indictment and that he was not there acting as an accountant, but that he was at all times a special agent and that his duties are not those of accountant but only to investigate criminal fraud; that he never stated at any time that he was investigating a criminal fraud case.

With reference to the statements in paragraph 13, affiant admits that he did make certain payments which were as a result of the audit made by Rev-

venue Agent Forrest Calkins, and therefore he assumed that his returns were correct as filed.

With reference to the statements in paragraph 15, the affiant denies each and every statement therein contained, except that he admits that he did introduce Mr. Faora as a certified public accountant to Mr. Weiss, and stated that he was familiar with the books and might be able to assist if there were any questions.

With reference to the statements in paragraph 16, the affiant denies each and every statement therein, and realleges [42] that Mr. Weiss stated that his audit was to check the books and records again, and that at no time did he state to the affiant that his purpose was to obtain evidence of criminal fraud.

II.

Reply to Affidavit of Dorothy Varble.

With reference to the statements in paragraph 2, the affiant denies each and every statement therein contained.

With reference to the statements in paragraph 3, the affiant does not have any personal knowledge of the conversation between Dorothy Varble and Irwin R. Weiss. In opposition to the statement of Dorothy Varble that "I told Mr. Hoffritz that there was a Government agent from the Bureau of Internal Revenue in the office who wanted to look at his books with regard to his income tax * * *" the affiant alleges that the conversation on the tele-

phone with Dorothy Varble was to the effect that there was a government man in the office who wanted to look at the books. The affiant further denies all of the other statements contained in said paragraph.

With reference to paragraph 4, the affiant does not have any personal knowledge of the statements therein, and therefore denies them on that ground.

With reference to the conversations alleged in paragraph 6, the affiant denies all of said conversations contained in said paragraph.

With reference to paragraphs 7 and 8, the affiant denies each and every allegation and statement therein contained.

With reference to paragraph 9, the affiant denies that he ever told Dorothy Varble to co-operate with and interpret and explain any entries in the books and records to Mr. Weiss. With reference to paragraph 10 wherein Dorothy Varble stated that she learned that Mr. Weiss was a special agent toward the end of the [43] audit, the said Dorothy Varble on the 25th day of August, 1953, made a statement under oath to Ezra Stein and Bernard B. Laven, affiant's attorneys, in which she stated that she learned that Mr. Weiss was a special agent after he had finished his audit and was out of there. In this same Affidavit she further stated that in her first conversation with Mr. Weiss at the office, that he did not tell her the purpose for which he wanted to see the books, nor did he tell Mr. Hoffritz

that he was a special agent from the Bureau of Internal Revenue, and further that she did not hear any of the conversation between Mr. Hoffritz and Mr. Weiss at that time.

With reference to all other matters that are not specifically denied, the affiant denies each and every one of the statements and allegations.

/s/ CHARLES W. HOFFRITZ.

Subscribed and sworn to before me this 26th day of January, 1955.

[Seal] /s/ BERNARD B. LAVEN,
Notary Public in and for Said
County and State.

Affidavit of Service by Mail attached.

[Endorsed]: Filed January 28, 1955. [44]

[Title of District Court and Cause.]

AFFIDAVIT OF WARD A. FAORO

State of California,
County of Los Angeles—ss.

Ward A. Faoro, being first duly sworn, deposes and says: That he is a certified public accountant, licensed to practice as such in the State of California, and that he has been rendering services as a certified public accountant, and prepared the 1948

income tax return for Charles W. Hoffritz, as an individual.

That the only occasion which he remembers meeting Mr. Irwin R. Weiss was one time when he was making a routine call and he stopped in and Mr. Hoffritz introduced the affiant to Mr. Weiss as his certified public accountant who was looking after the books; that if there was any question regarding the books, that the affiant might be able to assist him. That I never saw Mr. Weiss at any other time, and at that time Mr. Weiss did not [46] indicate in any manner that he was a special agent, but appeared to me to be a revenue agent.

/s/ WARD A. FAORO.

Subscribed and sworn to before me this 26th day of January, 1955.

[Seal] /s/ BERNARD B. LAVEN,
Notary Public in and for Said
County and State.

Affidavit of Service by Mail attached.

[Endorsed]: Filed January 28, 1955. [47]

[Title of District Court and Cause.]

FURTHER AFFIDAVIT OF IRWIN R. WEISS

United States District Court,
Southern District of California—ss.

Irwin R. Weiss, being first duly sworn, deposes and says:

(1) I am employed as a Special Agent of the Intelligence Division, Internal Revenue Service, 417 S. Hill Street, Los Angeles, California, and have been employed in such capacity since February 1, 1946.

(2) I graduated from Ohio State University, Columbus, Ohio, in June, 1932, with a degree in Business Administration and a major in Accounting; I was employed in an accounting capacity for private firms and in governmental agencies since graduation from college and until employed by the Intelligence Division, Internal Revenue Service, with the exception of military service from September 15, 1942, to January 10, 1946. [58]

(3) My duties as a Special Agent of the Intelligence Division, Internal Revenue Service, are to conduct independent investigations involving income and other tax frauds, and when violations of internal revenue laws or other statutes are disclosed to secure evidence for use in court; to examine and analyze accounting books and records of individuals and corporate taxpayers, and of concerns and individuals transacting business with taxpayers, includ-

ing banks, brokerage houses, public records, etc. My duties also include interviewing witnesses and the preparation of a comprehensive report of findings, with specific recommendation as to action to be taken. In criminal cases, I assist in the preparation of the case for trial by the United States Attorney's office and testify as a witness for the Government.

(4) I conduct the preliminary investigation of individuals and corporate taxpayers involving suspected income and other tax fraud cases. When more definite information is secured of the possible evasion of income and other taxes, a case number for the case is secured, the co-operation of an Internal Revenue Agent is requested, and the investigation proceeds on a joint basis with the revenue agent. This may result in either civil or criminal proceedings. If the preliminary investigation by the Special Agent does not indicate a possible evasion of income and other taxes, but does indicate a tax deficiency, the investigation is turned over to the Internal Revenue Agents for their completion of the case.

(5) Internal Revenue Agents conduct preliminary investigations of individuals and corporate taxpayers, which in some instances involve suspected income and other tax fraud cases. When information is secured of possible fraud, the investigation is discontinued, a report is written and the co-operation of a Special Agent is requested, and the investigation then proceeds on a joint basis,

which may result in either civil or criminal proceedings. [59]

(6) Only a small minority of investigations conducted by Special Agents results in criminal proceedings against individuals or corporations for violation of the internal revenue laws. For the period of July 1, 1954, to December 31, 1954, the statistics with respect to investigations, processed by Special Agents in the Intelligence Division, Los Angeles, California, is as follows:

Preliminary investigations assigned	298
Investigations reaching numbered status (evidence of fraud revealed).....	63
Prosecution recommended by Special Agents..	28
Forwarded to Department of Justice for criminal prosecution	15
Forwarded to United States Attorney for Criminal prosecution	10

(7) On April 7, 1953, I was assigned to conduct an investigation of the income tax liabilities of Charles W. Hoffritz, doing business as Glo-Dial Clock Company, on a preliminary basis. The books and records of the Glo-Dial Clock Company were turned over to me on a voluntary basis by Mr. Hoffritz. During the audit of the books and records, which took place between April 14, 1953, and May 1, 1953, Mr. Hoffritz visited the office assigned to me on the premises of the company, several times a day, and discussed various topics on a voluntary basis, such as personal history, prior audits by the Internal Revenue Service, etc. My audit of

Mr. Hoffritz's books and records revealed that they conformed to his tax returns for the years 1948 to 1952, inclusive. After completing my examination of Mr. Hoffritz's books on May 1, 1953, I conducted a further investigation and discovered that a substantial number of sales by Mr. Hoffritz was not reflected in his books and records and not reported in his tax returns for 1948 to 1952. On May 5, 1953, I requested a case number for this investigation and a case [60] number was assigned on June 4, 1953. An Internal Revenue Agent was assigned to the case on June 8, 1953. The books and records were not inspected and Mr. Hoffritz was not contacted after May 1, 1953.

/s/ IRWIN R. WEISS.

Subscribed and Sworn to before me, this 4th day of February 1955.

CLERK,

U. S. District Court, Southern
District of California;

By /s/ MAXINE LEWIS,
Deputy.

[Endorsed]: Filed February 4, 1955. [61]

[Title of District Court and Cause.]

REPLY TO FURTHER AFFIDAVIT OF IR-
WIN R. WEISS AND POINTS AND
AUTHORITIES IN OPPOSITION TO RE-
LIEF SOUGHT

I.

Counsel for the defendants is not correct in stating the contention of the plaintiff, in that no issue is made of the fact that the Special Agent Weiss did not warn the plaintiff of his constitutional rights; but, to the contrary, the point urged by the plaintiff was that Special Agent Weiss obtained the plaintiff's consent to inspect his personal books and records by fraud and deceit, in that he did not act in good faith when he knew that the purpose of his investigation was to obtain evidence for a criminal indictment, and with this knowledge he did not inform or advise the plaintiff of his true purpose.

The Court's inquiry at the oral argument was directed to the question of whether or not the investigation was being made by Special Agent Weiss as a routine audit, and as a result of that [62] audit Special Agent Weiss discovered for the first time certain evidence which tended to support a criminal indictment, or whether Special Agent Weiss had been informed that there was a basis for a criminal investigation for fraud. The plaintiff urged that a routine audit is made by a revenue agent, and not by a special agent, and therefore

the Court's inquiry was directed to the difference between the duties of a special agent and a revenue agent.

It is obvious from the Further Affidavit of Irwin R. Weiss, in paragraph 1, that he is a special agent of the Intelligence Division of the Bureau of Internal Revenue, and, in paragraph 3, that his "duties are to conduct an independent Investigation involving income and other tax frauds, and when violations of internal revenue laws or other statutes are disclosed to secure evidence for use in court * * *"

In paragraph 4 he again states that he conducts the preliminary investigation of individuals and corporate taxpayers involving suspected income and other tax fraud cases, which is further evidence that his duties involve tax matters in which fraud is suspected. Therefore, there must be a basis for this suspicion before the case is assigned to him.

In paragraph 7, he states that on April 7, 1953, he was assigned to conduct an investigation of the income tax liabilities of Charles W. Hoffritz, but fails to state whether or not the Special Agent in charge made the assignment, and where the Special Agent in charge obtained the information upon which to base the assignment to Mr. Weiss. It is significant that an Internal Revenue agent was not assigned to the case until June 8, 1953, which was nearly seven weeks after he commenced his investigation, and after he had completed his investigation on June 4, 1953. It should be pointed out

that Mr. Weiss' Further Affidavit is general and evades the specific facts which the Court [63] requested.

Therefore, in order to have before the Court all of the facts, it is necessary that a trial be had upon the merits after the usual discovery proceedings in civil cases have been completed.

II.

The Distinction Between the Duties of an Internal Revenue Agent and a Special Agent

Prior to the reorganization of the Bureau of Internal Revenue in 1952, the Revenue Agent in charge was charged with the duty of auditing the returns received from the Collector of Internal Revenue's office, which were divided into the following classes: (1) Those returns which were so complicated or so important that a field investigation was required without further consideration; (2) those returns which appeared to contain only minor irregularities which could be adjusted by correspondence with the taxpayer or by interviewing him at the office of the Internal Revenue Agent in Charge; and (3) those returns which did not appear to warrant investigation or contact with the taxpayer either by interview or correspondence. The returns selected for field examination were then subjected to further study by the office of the Internal Revenue Agent in charge, and assigned by him for field examination. See Mertens Law of Federal Income Taxation, Vol. 9, Sec. 49.23, p. 24, Sec. 49.27, p. 26.

Under the Bureau of Internal Revenue's Reorganization Plan No. 1 of 1952, the function of the Internal Revenue Agent and Special Agent was not changed. The function of the Special Agent is described in Treasury Department, Internal Revenue Circular 1-R. E. O. #1, dated May 12, 1952, and is as follows:

“The Intelligence Division embraces all Special Agents and will handle for the Director's office the type of work corresponding to that of a branch office of the present Intelligence Division under a Senior Special Agent. Thus [64] the separate identification of intelligence work, together with the rights to which Special Agents are entitled under the old organization, will be retained. In some Districts, there may not be an “Intelligence Division” in every Director's office because the size of the area covered or the workload may not justify a separate division. In those cases where it is not justified, the Special Agents for that territory will be assigned to the “Intelligence Division” at the District Commissioner's level. However, there will be no diminution in the intelligence activity, nor is there any intent to make any material shifts in the location of posts of duty.

“Intelligence Division. Responsible for the investigation of tax fraud, enrollment, and other types of cases delegated to the Intelligence Division, and the preparation of prosecution and tax reports thereon; for operation of special racketeer tax drive

and approval of all such cases for closing; and enforcement of the wagering tax law.”

To the Special Agent was assigned the principle investigatory work where fraud in a return was suspected, and as in the past, where potential fraud cases were assigned to the Special Agent whether initially, or being called into an investigation being done by a Revenue Agent, who has gone far enough in his examination to suspect fraud and who feels the need of the expert hand of the Special Agent.

See: *Fraud Under Federal Tax Law*, 2nd Ed. 1953, Balter, pp. 72 to 74, inclusive.

It should be noted from Special Agent Weiss' Affidavit that he initially was assigned the investigation, which was an indication to him that fraud was suspected, and therefore supports the plaintiff's position that Special Agent Weiss did not act in good faith. [65]

Under the Reorganization Plan No. 1, 1952, the audit division of the Director's office continued to conduct the examination of the books and records the same as before the reorganization took place. See: Charts 1, 2, and 3 of the Reorganization Plan of the Bureau of Internal Revenue, 1954, Cumulative Pocket Supplement, Vol. 9, *Law of Federal Income Taxation*, Mertens, pp. 37 to 40, inclusive.

The distinction between an Internal Revenue Agent and a Special Agent is best described by Joseph R. Baradell, former Special Agent in charge

New York Intelligence Division, Bureau of Internal Revenue, in the 12th Annual Institute of Federal Taxation, New York University, November, 1953, at page 59, where he points out the difference in their duties as follows:

“A Revenue Agent’s duties are inspection of problems contained in the audit of the taxpayer’s records, and determination of his correct tax liability.

“The Special Agent’s duties and responsibilities are primarily concerned with developing fraud features of the case, including a questioning of witnesses under oath, and procurement of documentary evidence for such use in court proceedings. He is also charged with the responsibility of recommendation for or against both criminal prosecution and ad valorem penalties for fraud or negligence.”

The Honorable H. Brian Holland, Assistant attorney General, in charge of Tax Division, Department of Justice, in the sixth annual meeting of the Tax Institute, U.S.C. School of Law, at page 446, stated:

“Investigations in cases of suspected tax evasions and other offenses under the Internal Revenue laws are made by Special Agents of the Intelligence Division of the Internal Revenue Service. If the Intelligence Division considers prosecution to be warranted, a recommendation to that effect [66] is transmitted to the Regional Enforcement Counsel, and if he agrees the case is forwarded to the

Department of Justice where it is assigned to the criminal section of the 'Tax Division.'

See, also, *Fraud Under Federal Tax Law*, 2nd Ed. 1953, Balter, Sec. 27, p. 69.

With reference to the revised opinion in the Guerrina case, January 11, 1955, C. C. H. Standard Federal Tax Reports, Paragraph 9143, Page 54,223, the revised opinion of Judge Clary does not support the Government's position, in that the Court pointed out that its previous order to return all evidence was in error, but that evidence obtained by an unconstitutional search and seizure is not admissible against the defendant, and a conviction obtained thereon would of necessity have to be reversed, which is the position that the plaintiff takes in the instant action.

It should be noted in that case that the government in its application for reconsideration requested the Court to reconsider and vacate its finding that the visit and examination of the Internal Revenue Agents on December 26, 1949, constituted an illegal search and seizure, on the basis that the request is that the defendant had failed to sustain his burden of establishing an illegal search and seizure. The Court stated:

"I disagree under the facts as I have found them in the previous opinion. Without a search warrant and without permission from the defendant, the Agents walked into his office, gained access to his closed files and took therefrom checkbooks, invoices

and other records. I found that such action was without defendant's permission, was not in pursuance of a search warrant legally issued, and was, therefore, an unlawful search and seizure in violation of the Fourth Amendment to the Constitution of the United States." [67]

The Court further stated:

"The Government has argued that the defendant by asking the Agents on or about December 22, 1949, whether they had all they needed, gave the Agents a blanket invitation to return thereafter in his absence to go through all his files and examine all books and records therein contained. I did not in my previous opinion and do not now construe defendant's words as granting permission to the Agents to return in his absence and search his files."

The Court further stated:

"That part of the Order of May 5, 1953, ordering the return of any property taken from the files of the defendant in his absence on December 26, 1949, and suppressing all evidence obtained on that visit by the Internal Revenue Agents will stand."

The Court finally states:

"Evidence obtained by an unconstitutional search and seizure is not admissible against the defendant and a conviction obtained thereon would of necessity have to be reversed."

It is respectfully submitted that in view of the

case of *Weldon v. U. S.*, 196 F. (2) 874, 875, and the other cases previously cited in plaintiff's Further Points and Authorities, that a full and complete civil trial should be had, where all the evidence and facts can be brought before this Court, after the usual civil discovery proceedings have been had, including the production of the assignment dated April 7, 1953, which is mentioned in paragraph 7 of the Further Affidavit of Irwin R. Weiss.

Respectfully Submitted,

/s/ BERNARD B. LAVEN,
Attorney for Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed February 11, 1955. [68]

[Title of District Court and Cause.]

ORDER ON MOTION UNDER RULE 41 (e)
OF FEDERAL RULES OF CRIMINAL
PROCEDURE

Plaintiff having filed a "Complaint for Temporary Restraining Order and Injunction, Suppression of Evidence, and demand for Jury Trial," alleging violation of the Fourth Amendment prohibition against "unreasonable searches and seizures," and violation of the Fifth Amendment provision against self-incrimination; and it appearing to the Court:

(1) that the action is properly to be treated as a motion pursuant to Rule 41(e) of the Federal

Rules of Criminal Procedure permitting a "Motion for Return of Property and to Suppress Evidence";

(2) that, concerning as they may discipline [75] of an officer of the court, and being of an equitable nature, the provisions of Rule 41(e) contemplate that the motion shall be heard and "tried upon the facts by the Court without a jury" [*Chieftain Pontiac Corp. v. Julian*, 209 F. 2d 657, 659 (1st Cir., 1954); Rules 47, 12(b)(4) Fed. Rules Crim. Proc., 18 U.S.C.A.; *Centraccio v. Garrity*, 198 F. 2d 382, 385 (1st Cir.), cert. denied, 344 U.S. 866 (1952); *United States v. Rosenwasser*, 145 F. 2d 1015, 1017 (9th Cir. 1944); see *United States v. Rosenwasser*, 323 U.S. 360 (1945); cf. *Weldon v. United States*, 196 F. 2d. 874, 875 (9th Cir. 1952)].

(3) that plaintiff admittedly consented to the inspection of his books by Special Internal Revenue Agent Weiss, but was not informed that the examination was being undertaken because plaintiff was suspected of willful tax evasion [see: *Montgomery v. United States*, 203 F. 2d 887, 892-893 (5th Cir., 1953); *Massei v. United States*, 295 Fed. 683, 684 (4th Cir.), cert. denied, 264 U.S. 592 (1924)].

(4) that plaintiff alleges he understood, when he gave consent, that the examination of his books concerned only his tax liability for the years 1947 and 1948, whereas it actually concerned his tax liability for the years 1948 through 1951, and later on 1952.

(5) that here, as in *United States v. Wolrich*,

119 F. Supp. 538 (S.D.N.Y., 1954), "The revenue agent made no attempt to hide his official identity or the official purpose of his business. Surely [76] defendant was aware that, if a 'routine audit' revealed evidence of criminal liability, the agent would not ignore it merely because he was primarily concerned with civil liability. Defendant was apprised of the fact that his books were sought for investigation by an official of the Internal Revenue Bureau." [119 F. Supp. at 540].

(6) that "failure to warn the defendants of their constitutional rights before questioning them [at a time when criminal prosecution was contemplated] as to their potential tax liability does not per se and as a matter of law render their admissions involuntary. The circumstances of the investigation and the failure to warn the defendants of their constitutional rights were matters which went only to the weight and credibility of the evidence thus obtained and not to its admissibility." [United States v. Guerrina, 126 F. Supp. 609, 610 (E.D. Pa. 1955)].

(7) that a reasonable man must be held to understand, when he opens his private books to an investigator charged with enforcing the law, criminal and civil, that he permits inspection for all purposes relevant to the inquiry—unless he imposes some specific limitation.

(8) that unlimited consent given under such circumstances is consent "voluntarily and understandingly given" [Powers v. United States, 223

U. S. 303, 313 (1912); accord, *Wilson v. United States*, 162 U. S. 613 (1896)].

(9) that assuming all of plaintiff's allegations to be true, and in particular that Special [77] Agent Weiss knew that fraud was suspected but did not inform plaintiff that the purpose of the investigation was to acquire evidence for a criminal prosecution, nevertheless plaintiff's constitutional rights to be free from "unreasonable searches and seizures" and from being "compelled * * * to be a witness against himself" were not violated [U. S. Const., Amend. IV, V]; and

(10) that "Even if the Government Agents obtained the voluntary disclosures * * * by the guile of a false representation that no investigation was pending * * * it could not be said that such a stratagem constitutes an unreasonable search and seizure within the meaning of the Fourth Amendment" [*Chieftain Pontiac Corp. v. Julian*, supra, 209 F. 2d at 659-660; accord, *United States v. American Stevedores*, 16 F. R. D. 164, 171 (S.D. N.Y. 1954); see *Bowles v. Chew*, 53 F. Supp. 787 (N.D. Cal., 1944)].

It is Ordered:

(a) that the order to show cause issued January 4, 1955, is hereby discharged.

(b) that defendants' "Motion to Strike Demand for Jury" filed January 17, 1955, is hereby granted.

(c) that plaintiff's motions to suppress evidence

and for return of property, and for a preliminary injunction, are hereby denied; and

(d) that defendants serve and lodge with the Clerk within ten days findings of fact, conclusions of law and judgment accordingly, to be settled pursuant to local rule 7. [78]

It is Further Ordered that the Clerk this day serve copies of this order by United States mail upon the attorneys for the parties appearing in this cause.

March 28, 1955.

/s/ WM. C. MATHES,

United States District Judge.

[Endorsed]: Filed March 29, 1955. [79]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled matter having come on for hearing on the first day of February, 1955, before the Honorable William C. Mathes, United States District Judge, the plaintiff represented by his counsel, Bernard B. Laven, and the defendants represented by their counsel, Laughlin E. Waters, United States Attorney for the Southern District of California, and Max F. Deutz and Cecil Hicks, Jr., Assistants United States Attorney for said district, and the Court having received affidavits, writ-

ten briefs and oral argument, and the Court being fully satisfied in the premises, makes its Findings of Fact and Conclusions of Law as follows:

Findings of Fact

I.

That the action is a motion for return of property and to suppress evidence, pursuant to Rule 41(e) of the Federal Rules [80] of Criminal Procedure.

II.

That Irwin R. Weiss is a Special Agent of the Intelligence Division, Internal Revenue Service, United States Treasury Department.

III.

That on April 14, 1953, Special Agent Weiss called at the office of the plaintiff, Charles W. Hoffritz, doing business as Glo-Dial Clock Company, 922 West 23rd Street, Los Angeles, California, and returned there from time to time up to and including May 1, 1953.

IV.

That on April 14, 1953, Special Agent Weiss advised plaintiff that he was investigating plaintiff's income tax liabilities, and made no attempt to hide his official identity or purpose of his business, but did not advise plaintiff of his right, under the United States Constitution, Amendment V, not to be a witness against himself.

V.

That plaintiff gave Special Agent Weiss permission to examine his books and records, and plaintiff

imposed no limitation on his consent, and that Special Agent Weiss did thereafter inspect said books and records.

VI.

That plaintiff's consent given to Special Agent Weiss to examine plaintiff's books and records was voluntarily and understandingly given, was not revoked, and continued to be voluntary during the period of investigation of said books and records by Special Agent Weiss.

From the foregoing Findings of Fact, the Court makes the following Conclusions of Law: [81]

Conclusions of Law

I.

That the action commenced by plaintiff is a motion for return of property and to suppress evidence, pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure.

II.

That the action arises out of this Court's power to discipline an officer of the Court and is equitable in nature, and further, pursuant to said Rule 41(e), the motion shall be heard and tried upon the facts by the Court without a jury.

III.

That the failure of Special Agent Weiss to advise plaintiff of his right, under the United States Constitution, Amendment V, not to be a witness against himself, does not render plaintiff's consent to examine his books involuntary.

IV.

The failure of Special Agent Weiss to advise plaintiff that a criminal investigation was pending was not a strategem amounting to an unlawful search and seizure within the meaning of the United States Constitution, Amendment IV.

V.

That plaintiff, as a reasonable man, is held to understand that when he gave permission to inspect his books and records to an investigator charged with enforcing the law, and placed no limitations on such permission, that he permits the inspection for all purposes relevant to the inquiry including evidence of wilfull tax evasion.

VI.

The plaintiff's right to be free from unlawful searches and seizures under the United States Constitution, Amendment V, was not violated. [82]

VII.

That plaintiff was not involuntarily compelled to be a witness against himself.

VIII.

That plaintiff's consent to examine his books and records was voluntarily and understandingly made, was not revoked, and continued to be voluntary during the period of investigation of said books and records by Special Agent Weiss.

Let Judgment Be Entered Accordingly.

Dated at Los Angeles, California this 18th day of April, 1955.

/s/ WM. C. MATHES,

United States District Judge.

Lodged April 8, 1955.

[Endorsed]: Filed April 18, 1955. [83]

United States District Court, Southern District of
California, Central Division

No. 17721-WM (Civil)

CHARLES W. HOFFRITZ,

Plaintiff,

vs.

UNITED STATES OF AMERICA, LAUGHLIN
E. WATERS, United States Attorney, and
IRWIN R. WEISS,

Defendants.

JUDGMENT

The above-entitled matter having come on for hearing on the first day of February, 1955, before the Honorable William C. Mathes, United States District Judge, the plaintiff being represented by his counsel, Bernard B. Laven, and the defendants being represented by their counsel, Laughlin E. Waters, United States Attorney for the Southern District of California, and Max F. Deutz and Cecil Hicks, Jr., Assistants United States Attorney for said district, and the Court having received affi-

davits, written briefs and oral argument, and the Court being fully satisfied in the premises, and the Court having made and filed its Findings of Fact and conclusions of Law,

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed:

I.

That the order to show cause issued January 4, 1955, should be, and hereby is, discharged. [84]

II.

That the defendant's motion to strike demand for jury filed January 17, 1955, should be, and hereby is, granted.

III.

That plaintiff's motions to suppress evidence and for return of property and for a preliminary injunction should be and hereby are, denied.

Dated at Los Angeles, California, this 18th day of April, 1955.

/s/ WM. C. MATHES,

United States District Judge.

Affidavit of Service by Mail attached.

Lodged April 8, 1955.

[Endorsed]: Filed April 18, 1955.

Docketed and entered April 19, 1955. [85]

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Plaintiff, Charles W. Hoffritz, moves the Court for an Order granting a new trial in the above-entitled action, in which judgment was entered on the 19th day of April, 1955, on the following grounds:

1. Insufficiency of evidence to support the decision of the Court, in that the Further Affidavit of Irwin R. Weiss in paragraph 4 admits that he conducts preliminary investigations which might result in criminal proceedings, and which fact he suppressed from the plaintiff in obtaining his consent to inspect his personal books and records, and therefore there is no evidence that the consent of the plaintiff was entirely voluntarily and understandingly given.

2. Error in law, in that the Court found for the defendants under section 41(e) of the Federal Rules of Criminal Procedure, thereby depriving the plaintiff of a trial of a civil [87] genuine issue as to material facts.

3. Newly discovered evidence that has been discovered since the hearing of this cause, and could not have been obtained for use at the hearing herein by the exercise of reasonable diligence, and which evidence is material and not merely cumulative or impeaching in character, and is of such nature that if received at the hearing, it would have probably produced a different decision, all of which more fully appears from the Affidavit of Bernard B. Laven in support hereof.

Dated: April 26, 1955.

/s/ BERNARD B. LAVEN,
Attorney for Plaintiff.

Receipt of Copy acknowledged.

[Endorsed]: Filed April 28, 1955. [88]

[Title of District Court and Cause.]

NOTICE OF MOTION FOR NEW TRIAL

To the Defendants and Their Attorney, Laughlin
E. Waters, United States Attorney:

You and Each of You Will Please Take Notice that the plaintiff will, in the United States District Court for the Southern District of California, on May 9, 1955, at 10:00 o'clock a.m., or as soon thereafter as counsel can be heard in the courtroom of the Honorable William Mathes, move the court to vacate and set aside the decision of the court rendered in the above-entitled matter and grant a new trial of said cause, upon each and every one of the grounds as set forth in the Motion.

The motion will be made pursuant to Rule 59(a) F.R.C.P., and upon the Affidavit of Bernard B. Laven, Minutes of the Court, and upon all the files, records, and pleadings in said matter.

Dated: April 26, 1955.

/s/ BERNARD B. LAVEN,
Attorney for Plaintiff.

Receipt of Copy acknowledged.

[Endorsed]: Filed April 28, 1955. [90]

[Title of District Court and Cause.]

AFFIDAVIT OF BERNARD B. LAVEN IN
SUPPORT OF MOTION FOR NEW TRIAL,
ON GROUNDS OF NEWLY-DISCOVERED
EVIDENCE

State of California,
County of Los Angeles—ss.

Bernard B. Laven, being first duly sworn, deposes and says:

That he is the attorney of record for the plaintiff. That as early as February 3, 1955, affiant wrote a letter to R. P. Hertzog, Acting Chief Counsel for the U. S. Internal Revenue Service, Washington, D. C., inquiring as to the duties of a Special Agent and those of a Revenue Agent, according to the Table of Organization as of April, 1953. That the affiant did not immediately receive any reply to said letter, and diligently pursued his inquiry to the said Chief Counsel, by writing another letter on February 22, 1955, and on March 1, 1955, received a letter of acknowledgement from said R. P. Hertzog to the effect that the letter had been referred to the Administration Office for [92] consideration, and it was not until March 29, 1955, that the affiant was able to obtain the desired information from the Regional Commissioner in San Francisco, a photostatic copy of which letter is marked Exhibit 1, attached hereto, and made a part hereof by reference as though fully set forth.

/s/ BERNARD B. LAVEN,
Affiant.

Subscribed and sworn to before me this 26th day
of April, 1955.

[Seal] /s/ PERCY DRABIN,
Notary Public in and for Said County and [93]
State.

EXHIBIT No. 1

U. S. Treasury Department
Internal Revenue Service
Regional Commissioner
San Francisco, Calif.
P. O. Box 889

March 28, 1955.

In Replying Refer to Ad:PC.

Mr. Bernard B. Laven,
Suite 1212,
530 West Sixth Street,
Los Angeles 14, California.

Dear Mr. Laven:

I have received your request of March 14, 1955,
for information concerning duties and responsi-
bilities assigned to Internal Revenue Agents and
those assigned to criminal investigations (Special
Agents). The following is a general discussion of
such duties:

The duties of an Internal Revenue Agent are to
administer, supervise, or perform work involved in
determining by investigations of taxpayers' books

of accounts and records, and other sources of information, the correct tax liability of taxpayers filing individual, partnership, fiduciary, corporation, and consolidated corporation income and excess profits tax returns; giving technical advice to taxpayers and taxpayers' representatives on questions involving income and excess profits tax matters; redetermination of tax entirely through investigation of claims, (filed by the taxpayers) for refund of income and excess profits taxes; discussions with taxpayers or their representatives to reach agreement on matters in dispute; in regard to cases appealed to the Tax Court of the United States or tax cases to be tried in the Federal courts, in giving assistance and advice to Government counsel who are developing the case record in preparation for trial; in cooperating with and assisting attorneys assigned to the Office of the General Counsel and the Office of the Attorney General in income and excess profits tax problems.

The duties of a Special Agent are to administer, supervise, or perform work involved in the investigations of alleged or suspected wilfull attempts by taxpayers to defraud the Government, which usually concern income taxes, but may concern estate, gift, Social Security, or a variety of excise taxes, with particular reference to the criminal phase of the cases with a view toward establishing conclusive proof for presentation in the courts of taxpayers' deliberate attempts to evade taxes; investigations of charges of unethical or criminal actions on the

part of agents and attorneys enrolled to practice before the Treasury Department, and of applicants to practice before the Treasury Department. Holds conferences on the highest [94] level with taxpayer, his attorney and/or accountant, Internal Revenue Service officials, and representatives of the Federal Government, such as judges, U. S. Attorneys, and prosecuting attorneys; makes recommendations regarding the institution of criminal proceedings in tax fraud cases.

The functions of Internal Revenue Agents and Special Agents are not prescribed by law, rule, or regulation. The duties described above are merely typical of what an Internal Revenue Agent or Special Agent might do. The actual assignment of duties, such as the typical duties shown above, to an individual employee of the Internal Revenue Service designated as an Internal Revenue Agent or a Special Agent is effected by the administrative action of a properly authorized supervisor.

If I can be of any further assistance to you, please let me know.

Very truly yours,

/s/ F. M. HARLESS,

Acting Regional
Commissioner.

[Endorsed]: Filed April 28, 1955. [95]

[Title of District Court and Cause.]

MINUTES OF THE COURT—MAY 31, 1955
At Los Angeles, Calif.

Present: Hon. Wm. C. Mathes, District Judge.

Counsel for Plaintiff: Bernard B. Laven.

Counsel for Defendants: Cecil Hicks, As-
sistant U. S. Attorney.

Proceedings:

For hearing motion of plaintiff for new trial.
Court Orders said motion denied.

JOHN A. CHILDRESS,
Clerk. [112]

United States District Court, Southern District of
California, Central Division

No. 17721—WM

CHARLES W. HOFFRITZ,

Plaintiff,

vs.

UNITED STATES OF AMERICA, et al.,

Defendants.

ORDER DENYING PLAINTIFF'S MOTION
FOR NEW TRIAL

Whereas, this matter came on for hearing on May
31, 1955, on plaintiff's Motion for New Trial, plain-

tiff appearing by and through his attorney, Bernard B. Laven, and defendants appearing by and through their attorneys, Laughlin E. Waters, United States Attorney; Louis Lee Abbott and Cecil Hicks, Jr., Assistants United States Attorney, and the Court having heard argument thereon both written and oral, and the Court being fully advised in the premises and good cause appearing therefor,

It Is Ordered that plaintiff's Motion for New Trial be and the same hereby is denied.

Dated: This 7th day of June, 1955.

Approved as to Form:

/s/ BERNARD B. LAVEN,
Attorney for Plaintiff.

/s/ WM. C. MATHES,
United States District Judge.

[Endorsed]: Filed June 7, 1955. [113]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Charles W. Hoffritz, Plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Final Judgment entered in this action on the 19th day of April, 1955, and the Order denying Plaintiff's Motion for a New Trial entered on the 31st day of May, 1955.

Dated June 27, 1955.

/s/ BERNARD B. LAVEN,
Attorney for Appellant.

[Endorsed]: Filed June 27, 1955. [114]

[Title of District Court and Cause.]

STIPULATION FOR EXTENSION OF TIME
WITHIN WHICH TO FILE RECORD AND
DOCKET APPEAL UNDER RULE 73g,
FEDERAL RULES OF CIVIL PROCE-
DURE

It Is Hereby Stipulated by and between the attorneys for the respective parties that pursuant to Rule 73g of the Federal Rules of Civil Procedure, the plaintiff and appellant Charles W. Hoffritz shall have to and including seventy-five (75) days, to wit: from the 27th day of June, 1955, to and including the 9th day of September, 1955, within which to file and docket his appeal, on the grounds that the said time is necessary in order to complete the reporter's transcript and prepare the various documents which have been requested by plaintiff and appellant in his Designation of Record on Appeal.

Dated this 17th day of July, 1955.

/s/ CECIL HICKS, JR.,

By CECIL HICKS, JR.,
Asst. U. S. Atty.

/s/ BERNARD B. LAVEN,
Attorney for Plaintiff and
Appellant.

It Is So Ordered this 18th day of July, 1955.

/s/ WM. C. MATHES,
Judge of the District Court.

[Endorsed]: Filed July 18, 1955. [119]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages, numbered 1 to 119, inclusive, contain the original:

Complaint.

Motion for Preliminary and Temporary Injunction.

Affidavit in Support thereof.

Points and Authorities in Support of Motion for P. and T. Injunction.

Order to Show Cause.

Affidavit in Opposition to Motion for Injunction.

Affidavit in Opposition to Motion for Injunction.

Motion and Notice of Motion to Strike demand for jury trial, etc.

Affidavit of Charles W. Hoffritz.

Affidavit of Ward A. Faoro.

Plaintiff's Further Points and Authorities.

Further Affidavit of Irwin R. Weiss.

Reply to Further Affidavit of Irwin R. Weiss.

Additional Points and Authorities on behalf of Plaintiff.

Order on Motion under Rule 41(e).

Findings of Fact and Conclusions of Law.

Judgment.

Motion for New Trial.

Notice of Motion for New Trial.

Affidavit of Bernard B. Laven.

Points and Authorities in Support of Motion for New Trial.

Additional Points and Authorities in Support of Motion for a New Trial.

Minutes of the Court for May 31, 1955.

Order Denying Plaintiff's Motion for New Trial.

Notice of Appeal.

Designation of Record on Appeal.

Stipulation for Extension of Time to Docket Record on Appeal.

which, together with a full, true and correct copy of minutes of the court for May 31, 1955, all in said cause, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing the foregoing record amount to \$2.00, which sum has been paid by appellant.

Witness my hand and the seal of said District Court, this 15th day of Sept., 1955.

[Seal] JOHN A. CHILDRESS,
Clerk.

/s/ CHARLES E. JONES,
Deputy Clerk.

[Endorsed]: No. 14874. United States Court of Appeals for the Ninth Circuit. Charles W. Hoffritz, Appellant, vs. United States of America, Laughlin E. Waters, United States Attorney, and Irwin R. Weiss, Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed September 17, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14874

CHARLES W. HOFFRITZ,

Appellant,

vs.

UNITED STATES OF AMERICA, LAUGHLIN
E. WATERS, United States Attorney, and IR-
WIN R. WEISS,

Appellees.

CONCISE STATEMENT OF POINTS ON
WHICH APPELLANT INTENDS TO RELY
ON APPEAL

Appellant Charles W. Hoffritz states that the points on which he intends to rely on the appeal herein are as follows:

The Court erred:

1. In holding that plaintiff's civil action was a motion for return of property and to suppress evidence pursuant to Rule 41 (e) of the Federal Rules of Criminal Procedure;

2. In holding that the action arises out of the District Court's power to discipline an officer of the court and is equitable in nature, and pursuant to Rule 41 (e) of the Federal Rules of Criminal Procedure, the motion should be heard and tried upon the facts by the Court, without a jury;

3. In finding that plaintiff and appellant gave Special Agent Weiss permission to examine his

books and records and imposed no limitation on his consent;

4. In holding that the failure of Special Agent Weiss to advise plaintiff and appellant of his rights under the United States Constitution, Amendment V, not to be a witness against himself, does not render plaintiff and appellant's consent to examine his books involuntary;

5. In holding that the failure of Special Agent Weiss to advise plaintiff and appellant that a criminal investigation was pending was not a stratagem amounting to unlawful search and seizure within the meaning of the United States Constitution, Amendment IV;

6. In holding that the plaintiff and appellant, as a reasonable man, is held to understand that when he gave his permission to inspect his books and records to an investigator charged with enforcing the law, and placed no limitations on such permission, he permits the inspection for all purposes relevant to the inquiry, including evidence of wilfull tax evasion;

7. In holding that the plaintiff and appellant's right to be free from unlawful search and seizure under the United States Constitution, Amendment V, was not violated;

8. In holding that the plaintiff and appellant was not involuntarily compelled to be a witness against himself;

9. In holding that the plaintiff and appellant's consent to examine his books and records was vol-

untarily and understandingly made, was not revoked, and continued to be voluntary during the period of investigation of his books and records by Special Agent Weiss;

10. In finding that plaintiff and appellant's civil action for the return of personal property was a motion pursuant to Rule 41 (e) of the Federal Rules of Criminal Procedure;

11. In hearing the matter upon affidavits, depriving plaintiff and appellant of the trial of a civil action upon oral evidence and its merits;

12. In denying plaintiff and appellant's motion for a temporary injunction restraining the defendants and appellee from doing any of the acts mentioned in Paragraph 1 of his prayer for relief in his complaint;

13. In refusing to order the return of all transcripts of books, papers, documents, records, and information obtained therefor by Special Agent Irwin R. Weiss and belonging to plaintiff and appellant;

14. In refusing to order the suppression of all the property mentioned in Paragraph 13 herein as evidence.

Dated: September 22, 1955.

/s/ BERNARD B. LAVEN,
Attorney for Appellant.

Receipt of Copy acknowledged.

[Endorsed]: Filed September 26, 1955.

Title of Court of Appeals and Cause.]

STIPULATION

It Is Hereby Stipulated by and between the attorneys for the plaintiff and appellant and defendants and appellees that an Indictment was returned by the Grand Jury and filed with the Clerk of the United States District Court for the Southern District of California, Central Division, on August 31, 1955, charging the appellant herein, in Count One, with violation of Section 145 (b) of Title 26, U.S.C., with reference to the calendar year 1948; in Count Two, with violation of Section 145 (b), of Title 26, U.S.C., with reference to the calendar year 1949; in Count Three, with violation of Section 145 (b), of Title 26, U.S.C., with reference to the calendar year 1950; in Count Four, with violation of Section 145 (b), of Title 26, U.S.C., with reference to the calendar year 1951; in Count Five, with violation of Section 145 (b) of Title 26, U.S.C., with reference to the calendar year 1952; in Count Six, with violation of Section 2707 (c) of Title 26, U.S.C., with reference to the month of December, 1949; in Count Seven, with violation of Section 2707 (c) of Title 26, U.S.C., with reference to the month of February, 1950; in Count Eight, with violation of Section 2707 (c), of Title 26, U.S.C., with reference to the month of March, 1950; in Count Nine, with violation of Section 2707 (c) of Title 26, U.S.C., with reference to the month of December, 1950; and in Count Ten, with violation of Section 2707 (c) of

Title 26, U.S.C., with reference to the month of June, 1951.

Dated this 22nd day of September, 1955.

/s/ BERNARD B. LAVEN,
Attorney for Appellant.

LAUGHLIN E. WATERS,
United States Attorney;

By /s/ CECIL HICKS, JR.,
Attorney for Appellees.

[Endorsed]: Filed September 26, 1955.

No. 14874

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CHARLES W. HOFFRITZ,

Appellant,

vs.

UNITED STATES OF AMERICA, LAUGHLIN E. WATERS,
United States Attorney, and IRWIN R. WEISS,

Appellees.

OPENING BRIEF OF APPELLANT.

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FILED

FEB 21 1956

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No. 14874

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CHARLES W. HOFFRITZ,

Appellant,

vs.

UNITED STATES OF AMERICA, LAUGHLIN E. WATERS,
United States Attorney, and IRWIN R. WEISS,

Appellees.

OPENING BRIEF OF APPELLANT.

Statement of Basis of Jurisdiction.

This is an appeal from a judgment by the District Court of the United States for the Southern District of California, Central Division. The judgment denies (without hearing of oral evidence) appellant's request for the return of personal property alleged to have been obtained from him by a Special Agent of the Bureau of Internal Revenue in violation of the Fourth and Fifth Amendments to the United States Constitution; temporary restraining order; and injunction-suppression of evidence [R. 3], and to enjoin its presentation to the Grand Jury.

A Motion for New Trial was filed within the time prescribed by law [R. 60], which Motion was denied on the 7th day of June, 1955 [R. 67].

Notice of Appeal by appellant was duly filed within the time prescribed by law [R. 67].

Jurisdiction.

The District Court had jurisdiction under Title 28, U. S. C., Section 1331(3), and this Court has jurisdiction under Title 28, U. S. C., Section 1291.

Opinion Below.

The District Court's opinion [R. 50] has not been officially reported in the Federal Supplement.

Statement of the Case.

This case arises out of an alleged unlawful search and seizure of the personal books and records belonging to the appellant by a Special Agent of the Bureau of Internal Revenue, in violation of the Fourth and Fifth Amendments to the Constitution of the United States of America.

The proceedings below were brought, prior to indictment, by the filing, on January 4, 1955, of a complaint in a civil proceeding, for a temporary restraining order and perpetual injunction enjoining the United States, and all persons in active participation with it, from presenting any and all of the evidence illegally obtained from appellant, and all information obtained therefrom to the United States Grand Jury, and suppressing all evidence obtained as a result of the illegal means used to obtain the books and records of the appellant, and ordering the return of all transcripts and copies of records, books, invoices, checks, and other physical records and objects to appellant or such other persons as may be lawfully entitled thereto [R. 3].

As a part of the proceedings below, the appellant filed a Motion for Preliminary and Temporary Injunction [R. 9], and an Order to Show Cause for Temporary Re-

straining Order [R. 13], which were based upon the complaint on file [R. 3] and the affidavits of the appellant [R. 10] and one Ward A. Faoro [R. 36].

So far as the Motion for Temporary Restraining Order sought to enjoin the presentation of evidence to the Grand Jury is concerned, it is now moot, for the threatened indictment was returned on August 31, 1955 [R. 75].

Briefly, the appellant alleged that he had been induced to turn over his books and records through fraud and deceit practiced upon him by Special Agent Irwin R. Weiss of the Bureau of Internal Revenue, who represented that he wanted to re-check appellant's books and records for the years 1947 and 1948. Appellant also alleged that his bookkeeper, one Dorothy Varble, was an informer and conspired with Special Agent Weiss to obtain appellant's permission to inspect his business books and records for this limited purpose; and then, contrary to this restricted permission, Dorothy Varble gave access to all of the books and records to Special Agent Weiss.

Appellant further alleged that Special Agent Weiss suppressed the fact that the purpose of his investigation was to obtain evidence for contemplated criminal proceedings; and at no time did he advise the appellant of his Constitutional rights, nor that the appellant could refuse to turn over his business books and records for examination.

The government offered, in opposition to appellant's Motion for Temporary Injunction, affidavits of Special Agent Weiss [R. 14] and Dorothy Varble [R. 22], which did not specifically deny the appellant's allegations but which were particularly phrased in such a manner as to leave many matters to conjecture and implication.

The appellant filed an affidavit [R. 29] categorically denying each material fact alleged by Special Agent Weiss and Dorothy Varble.

The complaint and the Motion for Temporary Injunction and Suppression of Evidence, together with the affidavits, constitute the only pleadings in the case. The government filed no answer to the complaint. The case, as made, was entirely by affidavit, and no oral evidence was received by the court.

The requested relief was denied by the court in an order made on March 28, 1955 [R. 50], and pursuant thereto, Findings of Fact and Conclusions of Law and Judgment were signed by the court on April 18, 1955 [R. 54].

Specifications of Error.

Essentially, this appeal challenges the failure of the court below to grant appellant a hearing on oral evidence to resolve the conflicts of facts raised by the pleadings and the affidavits, and holding that the civil action for the return of personal property was a criminal proceeding under Rule 41(e) of the Federal Rules of Criminal Procedure and that appellant had intelligently and understandingly waived his rights under the Fourth and Fifth Amendments. The specifications of error in the court's findings are as follows:

(1) Holding that appellant's civil action was a motion for return of property and to suppress evidence pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure, instead of following Rule 56 of the Federal Rules of Civil Procedure;

(2) Holding that the action arises out of the District Court's power to discipline an officer of the court and is

equitable in nature, and that pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure, the motion should be heard and tried upon the facts by the court, without a jury;

(3) Finding that appellant gave Special Agent Weiss permission to examine his books and records and imposed no limitation on his consent;

(4) Holding that the failure of Special Agent Weiss to advise appellant of his rights under the United States Constitution, Amendment V, not to be a witness against himself, does not render appellant's consent to examine his books involuntary;

(5) Holding that the failure of Special Agent Weiss to advise appellant that a criminal investigation was pending was not a stratagem amounting to unlawful search and seizure within the meaning of the United States Constitution, Amendment IV;

(6) Holding that appellant, as a reasonable man, is held to understand that when he gave his permission to inspect his books and records to an investigator charged with enforcing the law, and placed no limitations on such permission, he permits the inspection for all purposes relevant to the inquiry, including evidence of wilful tax evasion;

(7) Holding that appellant's right to be free from unlawful search and seizure under the United States Constitution, Amendment V, was not violated;

(8) Holding that appellant was not involuntarily compelled to be a witness against himself;

(9) Holding that appellant's consent to examine his books and records was voluntarily and understandingly

made, was not revoked, and continued to be voluntary during the period of investigation of his books and records by Special Agent Weiss;

(10) Finding that appellant's civil action for the return of personal property was a motion pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure;

(11) Hearing the matter upon affidavits, depriving appellant of the trial of a civil action upon oral evidence and its merits.

(12) Denying appellant's motion for a temporary injunction restraining the appellees from doing any of the acts mentioned in Paragraph 1 of appellant's prayer for relief in his complaint;

(13) Refusing to order the return of all transcripts of books, papers, documents, records, and information obtained therefrom by Special Agent Irwin R. Weiss and belonging to appellant;

(14) Refusing to order the suppression of all of the property mentioned in Paragraph (13) herein as evidence.

Summary of Argument.

The civil proceedings seeking the return of personal property were in the nature of a claim and delivery action and were properly brought before any criminal indictment, since appellant alleged a threatened deprivation of rights guaranteed to him by the Constitution.

The provisions of the Fifth Amendment are to be liberally construed in favor of the appellant.

The appellant contends that he did not knowingly and understandingly waive his immunity privilege under the Fourth and Fifth Amendments, but that his consent was

obtained by trickery, fraud, and deceit practiced upon him by Special Agent Weiss of the Bureau of Internal Revenue.

This trickery, fraud, and deceit consisted of the suppression, by Special Agent Weiss, of material facts from the appellant; and had these facts made known to him, appellant would not have permitted any examination of his personal books by an agent of the Bureau of Internal Revenue.

Among the material facts constituting fraud and deceit were the following:

That Special Agent Weiss had been informed by Dorothy Varble, appellant's bookkeeper, that appellant was suspected of tax evasion, which information Special Agent Weiss withheld from appellant.

That Dorothy Varble furnished certain information to the Bureau of Internal Revenue for the purpose of obtaining an informer's fee; and in furtherance of that end, contrary to appellant's specific instructions to give Special Agent Weiss his books for 1947 and 1948 only, for the purpose of re-checking them, she, without any limitation, gave Special Agent Weiss all appellant's books and records.

That appellant contends he was deluded into giving his consent to the examination of his books for the years of 1947 and 1948 by the representations that Special Agent Weiss desired to re-check them. Appellant was not aware of any irregularities, because these same books had been checked for these particular years by Revenue Agent Calkins, who made some minor technical civil adjustments which had been concluded without any indication even of civil fraud.

That Special Agent Weiss did not initially identify himself to the appellant as a Special Agent, nor did he explain to him that his principal duty is to obtain evidence for criminal proceedings.

That Special Agent Weiss did not disclose the nature of the assignment he had received from his superior.

That the suppression of the enumerated material facts was equivalent to fraud and deceit, and appellant did not legally consent to an examination of his books and records, because the consent was not understandingly and intelligently given, and the government failed to sustain the burden of showing that there was true consent.

Appellant contends that Special Agent Weiss could not have obtained a subpoena under Section 3602 of the Internal Revenue Code of 1939 if his investigation were merely exploratory.

The property of the appellant having been seized in violation of the Fourth and Fifth Amendments, it should have been returned; and it should also have been suppressed as evidence.

The appellant alleged facts sufficient to entitle him to a hearing on the merits after the issue was joined.

Appellant contends that he was deprived of an important right by the court's denying him a hearing and deciding the civil matter under the Federal Rules of Criminal Procedure, instead of the Federal Rules of Civil Procedure.

The most important issue of waiver of Constitutional rights should not be resolved by affidavit.

POINT I.

Appellant's Petition Alleged a Violation of His Rights Under the Fifth Amendment and Could Properly Be Brought Before the Indictment.

The Federal District Court may entertain and grant relief on a petition filed prior to indictment seeking a return of all papers, documents, or objects unconstitutionally seized and the suppression of the same as evidence.

Burdeau v. McDowell, 256 U. S. 465, 41 S. Ct. 574;

Go-Bart Co. v. U. S., 282 U. S. 344, 355, 51 S. Ct. 153;

Weldon v. U. S. (9th Cir.), 196 F. 2d 874, 875, cert. den. 51 S. Ct. 153;

In re Fried (2nd Cir.), 161 F. 2d 453, cert. den., 331 U. S. 858;

Freeman v. U. S. (9th Cir.), 160 F. 2d 69, 70 (1946);

Turner v. Camp (5th Cir.), 123 F. 2d 840 (1933);

In re No. 32 E. 67th St., 96 F. 2d 153;

Foley v. U. S. (5th Cir.), 64 F. 2d 1 (1933);

U. S. v. Poller (2nd Cir.), 43 F. 2d 911 (1930).

The rationale of the cases is that the petition for relief is addressed to the inherent power of the court to discipline an officer of the court.

In the case of *Go-Bart Co. v. U. S.*, 282 U. S. 344, 355, the court said:

“The United States Attorney and the Special agent in charge, as officers authorized to conduct such prosecution, and having control and custody of the

papers for that purpose, are in respect of the acts relating to such prosecution, alike, subject to the proper exertion of the disciplinary powers of the court. And on the facts herein shown, it is plain that the District Court had jurisdiction summarily to determine whether the evidence should be suppressed and the papers returned to the petitioner."

See:

Cogen v. U. S., 287 U. S. 221, 225, 49 S. Ct. 118.

POINT II.

The Consent of the Appellant to the Examination of His Books and Records Was Obtained by Trickery, Fraud and Deceit in Violation of the Fourth and Fifth Amendments.

Realistically viewed, the crucial issue in this case is whether the appellant has been deprived of his Constitutional rights.

Briefly, we contend that the court below erred in finding that appellant's Constitutional rights were not violated by the procedure and tactics employed by Special Agent Irwin R. Weiss.

The unreasonable search and seizure, in violation of the Fourth Amendment, compels the victim to produce evidence; and if the evidence is self-incriminating, the use of this evidence violates the victim's rights under the Fifth Amendment.

It thus appears that the protection against self-incrimination afforded the individual under each of these Amendments is a protection against compulsion exerted against him which forces the disclosure of self-incriminating evidence.

See:

Davis v. U. S., 328 U. S. 580, 582, 587, 66 S. Ct. 1256.

The general rules to be applied in the interpretation of situations under the Fifth Amendment are stated in the case of *Hoffman v. U. S.*, 341 U. S. 479, 71 S. Ct. 814, where the court said, commencing at page 485:

“The Fifth Amendment declares in part that ‘No person . . . shall be compelled in any criminal case to be a witness against himself.’

“‘This guarantee against testimonial compulsion, like other provisions of the Bill of Rights,’ was added to the original Constitution in the conviction that too high a price may be paid, even for the unhampered enforcement of criminal law, and that, in its attainment, other social objects of a free society should not be sacrificed,” (citing *Feldman v. U. S.*, 322 U. S. 487, 489, 64 S. Ct. 1082). “*This provision in the Amendment must be accorded liberal construction in favor of the right it was intended to secure.*” (Emphasis supplied.) “The privilege afforded not only extends to answers that would in themselves support a conviction under a federal criminal statute, but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime,” (citing *Blau v. U. S.*, 340 U. S. 150 [1950]).

See also:

Quinn v. U. S., 349 U. S. 155, 74 S. Ct. 861;

Emspak v. U. S., 349 U. S. 190, 74 S. Ct. 23;

Smith v. U. S., 337 U. S. 137, 150, 69 S. Ct. 1000.

The Supreme Court, in *McDonald v. U. S.*, 335 U. S. 451, at 453, 69 S. Ct. 191, in speaking of the Fourth Amendment, said:

“This guarantee of protection against unreasonable searches and seizures extends to the innocent and guilty alike. It marks the right of privacy as one of the unique values of our civilization, and with few exceptions, stays the hands of the police unless they have a search warrant issued by a magistrate, on probable cause, supported by oath or affirmation. And the law provides, as a sanction against the flouting of this Constitutional safeguard, the suppression of evidence secured as a result of the violation when it is tendered in a federal court.”

It has always been the rule that agents of the United States Government should be held to act in the highest good faith. If they obtain a waiver of a person's Constitutional rights by withholding from him and suppressing the fact that they are seeking evidence for a criminal prosecution, or misleading him on any material fact, they are not acting in good faith, and should not be able to benefit by a wrong which they have purposely and intentionally perpetrated.

The standards of conduct of Federal agents are enunciated in the very recent case of *Rae v. U. S.*, decided January 16, 1956, 76 S. Ct. 292, at page 294, where the court said:

“The obligation of a Federal agent is to obey the rules. They are drawn for innocent and guilty alike. They prescribe standards of law for law enforcement. They are designed to protect the privacy of a citizen unless the strict standards of search and seizure are satisfied. That policy is defeated if a

Federal agent can flaunt them and use the fruits of his unlawful act in either Federal or state proceedings.”

The law is well settled that evidence obtained by coercion, fraud, threats, or stealth is not submitted voluntarily and is equivalent to compelling the individual to be a witness against himself, and is not admissible against an accused. Self-incrimination is the same whether raised under the Fourth or the Fifth Amendment.

The authorities on this proposition are many. Only the following are cited:

United States v. Jeffers, 342 U. S. 48, 72 S. Ct. 93;

McDonald v. U. S., 335 U. S. 451, 69 S. Ct. 191;

Johnson v. U. S., 333 U. S. 10, 68 S. Ct. 367;

Go-Bart Co. v. U. S., 282 U. S. 344, 51 S. Ct. 153;

United States v. Lefkowitz, 285 U. S. 452, 52 S. Ct. 420;

Agnello v. U. S., 269 U. S. 20, 33-34, 46 S. Ct. 4;

Amos v. U. S., 255 U. S. 313, 41 S. Ct. 360;

Gouled v. U. S., 255 U. S. 298, 306, 311, 41 S. Ct. 261;

Weeks v. U. S., 232 U. S. 383, 34 S. Ct. 341.

Consent to waive immunity must be entirely voluntary and not induced by misrepresentation, fraud, trickery, promise, or threats.

See:

Gouled v. U. S., 255 U. S. 298, at 305-306, 41 S. Ct. 261;

Go-Bart Co. v. U. S., 282 U. S. 344, 51 S. Ct. 153.

The government contended in its affidavits that the appellant consented to the examination. In order for the consent to constitute a waiver of Constitutional rights, it must appear that the consent was freely and intelligently given, and the government has the burden of showing that there was true consent. See:

United States v. Rekis (D. C., Mass.), 119 Fed. Supp. 687.

Appellant contends that the government has failed to meet this burden. Had the appellant been informed of the nature of the examination, he would have had sufficient warning to avail himself of his privilege against self-incrimination. He should have been entitled to know that a criminal investigation was being directed against him.

Analysis of the methods employed by Special Agent Weiss discloses a carefully staged plan of conduct which compelled and demanded that the Special Agent inform the appellant that his case was under criminal investigation. But nothing was said by Special Agent Weiss to appellant to apprise him of the true situation. Instead, the appellant was deluded into giving his consent by being misled into believing that the examination was merely a re-check of his 1947 and 1948 tax liabilities, which had been previously audited by Revenue Agent Forrest Calkins and which did not disclose any matters of civil or criminal fraud but only civil adjustments [R. 10]. Special Agent Weiss was very careful not even to mention whether it was a civil investigation.

Under such circumstances, it cannot be said that appellant voluntarily made available his papers for the purpose of establishing fraud for criminal prosecution.

Dorothy Varble admits (because she does not deny) that she was the informer and furnished to the Bureau of Internal Revenue the information that was instrumental in the institution of the investigation. Nor does Special Agent Weiss directly answer or reply to that specific charge.

Dorothy Varble does not specifically deny that appellant limited the inspection to re-checking his 1947 and 1948 records, nor does she refute appellant's contention that there was collusion between her and Special Agent Weiss when she turned over all of appellant's books and records without limitation. She attempts to justify her conduct by the preposterous and absurd statement that the appellant had told her, on numerous occasions, that all of his books and records should be made available for inspection to any authorized government official [R. 22].

It appears that she turned over, without any limitation, all of the binders and journals from 1944 through 1952 [R. 24] without Special Agent Weiss' asking specifically for them, although in Special Agent Weiss' conversation with Mr. Hoffritz over the telephone, he does not claim to have specified what years he wanted to examine [R. 15].

Special Agent Weiss did not specifically identify himself over the telephone [R. 15], and suppressed the fact that he was a Special Agent whose primary duty it is to obtain evidence for contemplated criminal proceedings. Unless the agent's identity is fully disclosed, the government is obtaining evidence by deceit.

Special Agent Weiss does not refute that having been assigned initially to conduct the investigation, instead of a Revenue Agent, put him on notice that it was a crim-

inal investigation, which information should have been conveyed to the appellant.

It is further significant that Special Agent Weiss did not explain the difference between a Special Agent and a Revenue Agent.

Prior to the reorganization of the Bureau of Internal Revenue in 1952, the Revenue Agent in charge was charged with the duty of auditing the returns which were received from the Office of the Collector of Internal Revenue, which were divided into the following classes:

(1) Those returns which were so complicated or so important that a field investigation was required without further consideration;

(2) Those returns which appeared to contain only minor irregularities which could be adjusted by correspondence with the taxpayer or by interviewing him at the office of the Internal Revenue Agent in Charge; and

(3) Those returns which did not appear to warrant investigation or contact with the taxpayer either by interview or correspondence.

The returns selected for field examination were then subjected to further study by the Office of the Internal Revenue Agent in Charge, and assigned by him for field examination. (See *Mertens Law of Federal Income Taxation*, Vol. 9, Sec. 49.23, p. 24; Sec. 49.27, p. 26.)

Under the Bureau of Internal Revenue's Reorganization Plan No. 1 of 1952, the functions of the Internal Revenue Agent and Special Agent were not changed.

The function of the Special Agent is described in *Treasury Department, Internal Revenue Circular 1—R. E. O. 1*, dated May 12, 1952, and is as follows:

“The Intelligence Division embraces all Special Agents and will handle for the Director’s office the type of work corresponding to that of a branch office of the present Intelligence Division under a Senior Special Agent. Thus, the separate identification of intelligence work, together with the rights to which Special Agents are entitled under the old organization, will be retained. In some Districts, there may not be an ‘Intelligence Division’ in every Director’s office because the size of the area covered or the workload may not justify a separate division. In those cases where it is not justified, the Special Agents for that territory will be assigned to the ‘Intelligence Division’ at the District Commissioner’s level. However, there will be no diminution in the intelligence activity, nor is there any intent to make any material shifts in the location of posts of duty.

“*Intelligence Division.* Responsible for the investigation of tax fraud, enrollment, and other types of cases delegated to the Intelligence Division, and the preparation of prosecution and tax reports thereon; for operation of special racketeer tax drive and approval of all such cases for closing; and enforcement of the wagering tax law.”

To the Special Agent was assigned the principal investigatory work where fraud in a return was suspected, and as in the past, where potential fraud cases were assigned to the Special Agent, whether *initially*, or whether called into an investigation being conducted by a Revenue Agent, who has gone far enough in his examination to

suspect fraud, and who feels the need of the expert hand of the Special Agent.

See:

Fraud Under Federal Tax Law, 2nd Ed., 1953,
Balter, pp. 72-74, incl.

Under the Reorganization Plan No. 1, 1952, the audit division of the Director's Office continued to conduct the examination of the books and records the same as before the reorganization took place. (See: *Charts 1, 2 and 3 of the Reorganization Plan of the Bureau of Internal Revenue*, 1954, *Cumulative Pocket Supplement*, Vol. 9, *Mertens Law of Federal Income Taxation*, pp. 37-40, incl.)

The distinction between an Internal Revenue Agent and a Special Agent is best described by Joseph R. Baradell, former Special Agent in Charge, New York Intelligence Division, Bureau of Internal Revenue, in the 12th Annual Institute of Federal Taxation, New York University, November, 1953, at page 59, where he points out the difference in their duties as follows:

"A Revenue Agent's duties are inspection of problems contained in the audit of the taxpayer's records, and determination of his correct tax liability.

"The Special Agent's duties and responsibilities are primarily concerned with developing fraud features of the case, including a questioning of witnesses under oath, and procurement of documentary evidence for such use in court proceedings. He is also charged with the responsibility of recommendation for or against both criminal prosecution and *ad valorem* penalties for fraud or negligence."

The Honorable H. Brian Holland, Assistant Attorney General, in charge of Tax Division, Department of Justice,

in the sixth annual meeting of the Tax Institute, U. S. C. School of Law, at page 446, stated:

“Investigations in cases of suspected tax evasions and other offenses under the Internal Revenue laws are made by Special Agents of the Intelligence Division of the Internal Revenue Service. If the Intelligence Division considers prosecution to be warranted, a recommendation to that effect is transmitted to the Regional Enforcement Counsel, and if he agrees, the case is forwarded to the Department of Justice, where it is assigned to the criminal section of the Tax Division.”

See also:

Fraud Under Federal Tax Law, 2nd Ed., 1953,
Balter, Sec. 27, p. 69.

The appellant's position is further supported by the recent case of *United States v. Wolrich*, 129 Fed. Supp. 528 (D. C., N. Y., 1955), in which it is pointed out:

“Revenue Agent's Manual, in ¶675, prescribed the procedure to be followed where an Internal Revenue Agent discovers what he believes to be indications of fraud. If the Internal Revenue Agent in Charge concludes that the findings of the Internal Revenue Agent indicate probable fraud, he will then request the consideration of the Special Agent in Charge as to the necessity for a Joint Investigation. If the Special Agent in Charge decides to investigate, he 'will * * * promptly assign to the case a Special Agent.' From this it appears that a Joint Investigation is one that is initiated when probable fraud is indicated.”

Special Agent Weiss gave no intimation or indication of any kind that appellant was suspected of criminal tax evasion; and further, Special Agent Weiss does not deny

that he well knew that if the taxpayer were aware that he was a criminal investigator, it would hinder the obtaining of the records.

He does not specifically refute the allegation of appellant that he knew that if he advised appellant that it was his purpose to obtain evidence for contemplated criminal proceedings, because he had information furnished by Dorothy Varble that there were irregularities in the appellant's books, and that the appellant was suspected, at least, of criminal tax evasion, the appellant would not have given his consent to an inspection of his individual books and records.

The submission of evidence by an individual under such circumstances is certainly not voluntary. It was neither with the knowledge of his rights nor with the knowledge that the government's purpose was to contend later that such submission, without notice of the purpose for which the evidence was being submitted, meant that the individual thereby waived his immunity privileges.

Under the Fifth Amendment, a person has the right to be dealt with honestly and fairly. This rule is enunciated in *Brock v. U. S.* (5th Cir.), 223 F. 2d 681, at 685, where the court said:

"Before a man can be compelled to testify against himself, he must have a *fair chance to exercise* his right under the Fifth Amendment. *Where that fair chance is not afforded him*, evidence obtained in violation of his right is not only not admissible against him, but it is incapable of becoming the foundation for the violation of his rights under the Fourth Amendment. Freedom from unreasonable search would be a delusion indeed, if evidence obtained

through compulsory self-incrimination may be used as a basis for violating that right.” (Emphasis added.)

If Special Agent Weiss’ investigation was a general exploratory search, it could not have been undertaken with or without a warrant.

See:

United States v. Rabinowitz, 339 U. S. 56, 70 S. Ct. 430.

In the instant case, Special Agent Weiss had more than a suspicion. He had in his possession sufficient evidence to obtain a search warrant under Section 3602 of the Internal Revenue Code of 1939 (See App. [A]), to question the appellant about his income tax returns, where an opportunity would have been afforded to him to refuse to answer any question propounded to him.

Whenever possible, a subpoena or search warrant should be employed by government agents.

See:

Carroll v. U. S., 267 U. S. 132, 45 S. Ct. 280.

This was not done, because Special Agent Weiss well knew that he could not obtain a search warrant for the evidentiary material which he was seeking, and his deliberate misrepresentations to obtain evidence, which would not be otherwise available to him under a search warrant, should not be condoned.

The leading cases of *Gouled v. U. S.*, 255 U. S. 298, 310, 41 S. Ct. 261, and *United States v. Lefkowitz*, 285 U. S. 452, 465, 52 S. Ct. 420, also strongly support appellant’s position.

The facts here compel the conclusion that the initial purpose of Special Agent Weiss was to secure evidence from the taxpayer's records for a contemplated criminal prosecution. The deliberate attempt to conceal the criminal aspect of an investigation raises a presumption of deceit, and suggests that the appellant would not have turned over the information if he had been aware of the government's purpose.

The law of fraud makes no distinction between false representations and implied misrepresentations, or a concealment.

See:

Charles Hughes & Co. v. Securities & Exchange Commission (2nd Cir.), 139 F. 2d 434, 437, cert. den., 321 U. S. 786.

Fraud is further defined in *Gibbons v. Brandt* (7th Cir.), 170 F. 2d 385, 391 (cert. den. 336 U. S. 921), where the court said:

“Fraud also includes anything calculated to deceive, whether it be a single act or a combination of circumstances; whether suppression of truth or suggestion of what is false; whether it be by direct falsehood or by innuendo; by speech or by silence. It is sufficient that there were acts such as to mislead a reasonably cautious or prudent man in regard to the existence of a fact forming a basis of or contributing an inducement to some change of position by him.”

There should not be any lesser degree of protection to an individual wherein a search warrant is required than where a government agent gains access to one's books and records by suppressing a material fact.

See:

United States v. Arrington (7th Cir.), 215 F. 2d 630, 633.

There certainly is no justification for an exhaustive search of appellant's records without giving him an opportunity to refuse to give evidence which is to be used against him.

The rights of an accused are to be zealously guarded; and if a taxpayer may waive his immunity only by an intelligent act . . . that is, the knowledge of all the material facts . . . why should incriminating evidence be obtained, with knowledge or suspicion of criminal fraud, without notice to the appellant that such evidence may be used against him in a criminal proceeding, when the written word of an appellant and his books and records will convict as readily as any signed confession?

The tenor of all the cases resolves itself into one single question, that being the good faith of the Federal officers in obtaining the evidence.

See:

Catalanotte v. U. S. (6th Cir.), 208 F. 2d 264.

The investigative procedure reflected here has raised the identical questions answered by the court in *United States v. Guerrina* (D. C., Pa.), 1953, 112 Fed. Supp. 126, 128; re-argument, 126 Fed. Supp. 609:

(1) Did the appellant legally consent to an examination of his books and records by the Special Agents?

(2) Was the unauthorized entrance by the agents into filing cabinets containing work orders, examination of the

patterns, and acquisition of private correspondence an unlawful search and seizure in violation of the Fourth Amendment to the Constitution?

In the first *Guerrina* opinion, the court determined that obtaining evidence under the guise of a civil investigation is tantamount to obtaining evidence under the guise of a business or social call, using as an analogy *Gouled v. U. S.*, 255 U. S. 298, holding tax records obtained by stealth inadmissible, and specifically held that under the circumstances, the government agents were required to inform the taxpayer that his case was under criminal investigation.

The facts in the instant case are comparable to those in the case of *United States v. Lipshitz* (D. C., N. Y.), 132 Fed. Supp. 519, in which the District Court ordered a hearing and suppressed certain evidence; and the court said at page 523:

“I am satisfied that from June 30, 1948, the day Potts was assigned to the case, he, together with Obst, were jointly engaged in the preparation of a case for the criminal prosecution of the Defendant, and they did not inform him, nor did he know, that they were so engaged. Pott’s assignment of Obst, a Revenue Agent, to obtain, without the Defendant’s knowledge and consent, extensive information and extracts from the taxpayer’s books and records far in excess of those required for the customary routine audit of a Revenue Agent, cannot be appreciably distinguished from the obtainment thereof by stealth or subterfuge.”

See also:

In re Liebster (D. C., Pa.), 91 Fed. Supp. 814.

The consent which makes available an individual's records to official search and seizure cannot be deemed voluntary unless it be made clearly to appear that it was freely and intelligently given and not expressed impliedly or coerced.

See:

United States v. Minor (D. C., Okla.), 117 Fed. Supp. 697.

The courts have granted motions to suppress evidence where there has been the slightest deception, and have required the government to show that the consent is unequivocal and specific.

See:

Gouled v. U. S., 255 U. S. 298, 305, 41 S. Ct. 261;

Judd v. U. S. (C. A., D. C.), 190 F. 2d 644, 651;

Karwicksi v. U. S. (4th Cir.), 55 F. 2d 225;

Kovach v. U. S. (6th Cir.), 53 F. 2d 639;

Cf. U. S. v. Shotwell Mfg. Co. (7th Cir.), 225 F. 2d 394.

Special Agent Weiss carefully avoided identifying himself as a Special Agent when he first talked to appellant over the telephone, and his permission was granted under color of his being a government man.

A waiver of Constitutional immunity from unreasonable searches cannot be inferred from the admitting of law enforcement officers in compliance with their request for an interview.

A very important rule involving an essential element of the doctrine of waiver is announced in the case of

Johnson v. U. S., 333 U. S. 10, where the Supreme Court held at page 13:

“Entry to the defendant’s living quarters, which was the beginning of the search, was demanded under the color of his office. It was granted in submission to authority rather than an understanding and intentional waiver of a Constitutional right.”

And at page 17, the court said:

“An officer gaining access to private living quarters under color of his office and of the law which he personifies must then have some valid basis in law for intrusion. Any other rule would undermine the right of the people to be secure in their persons, houses, papers, and effects, and would obliterate one of the most fundamental distinctions between our form of government, where officers are under the law, and the police-state, where they are the law.”

These principles have been vigorously enforced in the Circuit Courts of Appeal.

The leading case is *Judd v. U. S.* (C. A., D. C.), 190 F. 2d 649, where the defendant was under arrest and was asked whether he minded (the police) going to his room and taking a look at it, and he said, “No.” The court at 650 said:

“Searches and seizures made without a proper warrant are generally to be regarded as unreasonable and violative of the Fourth Amendment. True, the obtaining of the warrant may on occasion be waived by the individual: he may give his consent to the search and seizure. But such a waiver of consent must be proved by clear and positive testimony, and it must be established that there was no duress or coercion, actual or implied.”

And at 652, the court further states:

“Before a court holds that the defendant has waived his protection under the Fourth Amendment, ‘there must be convincing evidence to that effect.’

* * *

“The relative credibility of the witness is not the central issue in this case. The real issue is whether the evidence offered by the government, taken at full value, meets the required standard. We hold that it does not; that there has not been a sufficient showing of true consent, free from duress and coercion. Standards of this sort must be maintained and enforced by trial and appellate courts. If they are not, the guarantees of the Bill of Rights can quickly disappear.”

See also:

Contee v. U. S. (C. A., D. C.), 215 F. 2d 324, 327.

The decision in the *Judd* case was followed by the same court in *Nelson v. U. S.* (C. A., D. C.), 208 F. 2d 505, at p. 509, wherein it was stated:

“It is clear from *Judd* and the many cases discussed therein that consent, like ‘The fairness of a trial must be determined by appraisal of the whole rather than by picking and choosing among its component parts.’ Only in that way can we ascertain whether consent is voluntary, *i. e.*, given ‘freely and intelligently’, without physical or moral compulsion.”

In the case of *Higgins v. U. S.* (C. A., D. C.), 209 F. 2d 819, the police officer testified that the appellant had given his consent, which was denied by the appellant. The court stated at page 820:

“We assume for present purposes that the officer’s testimony was true and the appellant’s false. Even

so, we think the record does not support the findings that appellant consented to the search * * *.

“Words or acts that would show consent in some circumstances do not show it in others. ‘Non-resistance to the orders or suggestions of the police is not infrequent * * *’. True consent, free of fear or pressure, is not so readily found.”

See also:

United States v. Di Re, 332 U. S. 581, 68 S. Ct. 222;

Wrightson v. U. S. (C. A., D. C.), 222 F. 2d 556;

United States v. Arrington (7th Cir.), 215 F. 2d 630;

United States v. Lantrip, 74 Fed. Supp. 946;

Heater v. U. S. (9th Cir.), 27 F. 2d 521.

The essential facts in the instant case are undisputed, and it has been held that the trier has no right to refuse to accept them.

See:

United States v. Johnson (5th Cir.), 208 F. 2d 729;

N. L. R. B. v. Ray Smith Transport Co. (5th Cir.), 193 F. 2d 142;

San Francisco Association for the Blind v. Industrial Aid, Inc. (8th Cir.), 152 F. 2d 532, 536 (D. C. Cal.), 1946;

Herbert v. Riddell, 103 Fed. Supp. 369, 389.

The records of the appellant, being his individual business records, were subject to Constitutional protection; and if they were to be obtained, it must be without any

deception whatsoever. The important factor is that our Bill of Rights contemplates that a citizen not only shall be protected by the immunity privilege, but also that he shall have an opportunity, after notice, to waive or stand on his privileges.

The rule to be followed by a court in determining whether or not there has been a waiver is set forth in the case of *Johnson v. Zerbst*, 304 U. S. 458, 464, 54 S. Ct. 1019, where the court said:

“It has been pointed out that the Courts indulge in every reasonable presumption against waiver of fundamental Constitutional rights, and that we do not presume acquiescence in the loss of fundamental rights. A waiver is ordinarily *an intentional relinquishment or abandonment* of a known right or privilege.” (Emphasis supplied.)

The rationale of this rule is applicable for the reason that it involves a right under the Bill of Rights. Any other interpretation would narrow the safeguard under the Fifth Amendment.

In arriving at the conclusion that the government did not obtain the books and records of the appellant by illegal means, the court below wholly failed to follow the doctrines of waiver which have been established by judicial precedent.

POINT III.

The Appellant Was Entitled to a Hearing on the Basis of the Conflicting Allegations in the Complaint and Affidavits and Was Deprived of the Right to a Hearing of Evidence.

Appellant maintains that he made the requisite preliminary showing because, according to familiar principles, all that a movant in such proceedings is required to show is that illegal means were used to obtain evidence from him.

Rule 41(c) of the Federal Rules of Criminal Procedure, provides as follows:

“A person aggrieved by an unlawful search and seizure may move the District Court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without a warrant.
* * * The judge shall receive evidence on the issues of fact necessary to the decision of the motion.”

The court below erred in accepting the statements in the government's affidavits as evidence. These statements cannot be considered reasonably accurate or as having the legal significance amounting to the dignity of proof.

In the case of *United States v. Warrington*, 17 F. R. D. 25, Northern District of California, the court said at page 29:

“An affidavit is not evidence” (citing *Vendetti v. U. S.* [9th Cir.], 45 F. 2d 543) “and it may not be used as evidence in this proceeding to satisfy the mandate that the Court ‘receive evidence on any issue of fact.’ The defendant is therefore obliged to support his motion by competent legal evidence produced or adduced in court at the time of the hearing.

If the rule were otherwise, the clear meaning of the mandate in Rule 41 would be nullified.”

In the case of *United States v. Manno* (D. C., Ill.), 118 Fed. Supp. 511 (1954), the facts are analogous to the instant case. The court said at page 516:

“It is evident that there is a factual controversy as to the circumstances surrounding the examination of the books and their relinquishment to the government. In the opinion of the Court, this controversy needs to be resolved by evidentiary proof. The principles of law relative to the legality of investigations of books and evidence procured therefrom seem well settled. Evidence obtained by stealth is subject to a motion to suppress” (citing *Gouled v. U. S.*, 255 U. S. 305).

In view of the fact that appellant filed a civil proceeding, prior to indictment, for the return of personal property, Rule 56 of the Federal Rules of Civil Procedure (App. B) should control, and not Rule 41(e) of the Federal Rules of Criminal Procedure.

Under Rule 56 of the Federal Rules of Civil Procedure, it has been held that a court can only determine the existence of a genuine and material factual issue, and if none exists, then summary judgment cannot be granted.

This court, in the very recent case of *Griffeth v. Utah Power & Light Co.* (9th Cir.), 226 F. 2d 661, said at page 669:

“Resort to summary judgment procedure is futile where there is any doubt as to whether there is a fact issue. All doubts upon the point must be resolved against the moving party. This Rule, on account of these limitations, was not intended to be used as a substitute for a regular trial of cases where there are disputed issues of fact upon which the out-

come of litigation depends. This procedure is not, and of right ought not to be, a substitute for a trial by jury or judge.”

See also:

Union Transfer Co. v. Riss & Co. (9th Cir.),
218 F. 2d 553, 554;

Dulansky v. Iowa-Illinois Gas & Electric Co., (8th
Cir.), 191 F. 2d 881, 883;

*Westinghouse Electric Corp. v. Bulldog Electric
Products Co.* (4th Cir., 1950), 179 F. 2d 139,
146;

Winter v. Southern Bell Tel. & Tel. Co. (5th Cir.),
181 F. 2d 341.

The court below, in denying this appellant a hearing on disputed facts, deprived him of an important right to a trial on its merits, and the cross-examination of adverse witnesses about crucial facts, particularly within their knowledge.

See:

Cf. Sartor v. Arkansas Natural Gas Corp., 321
U. S. 620, 627, 64 S. Ct. 724;

Lane Bryant v. Maternity Lane Ltd. (9th Cir.),
173 F. 2d 559, 565.

The court below further deprived the appellant of the right to prove by oral evidence that he did not have an understanding and knowledgeable choice in waiving his Constitutional rights. Such an important issue should not be heard on affidavits.

See:

Kennedy v. Silas Mason Co., 334 U. S. 249, 256-
257, 68 S. Ct. 1031;

Universal Oil v. Root Refinery Co., 328 U. S.
575, 580, 66 S. Ct. 1176.

Conclusion.

In view of the manifest errors, the judgment of the District Court should be reversed, and the case should be remanded to the District Court with directions to enter a judgment suppressing the information obtained from the appellant's books and records as evidence, or, in the alternative, directing the court below to set the matter down for a hearing.

Respectfully submitted,

BERNARD B. LAVEN,

Attorney for Appellant.

APPENDIX A.

Section 3602, Internal Revenue Code, 1939.

Section 3602. *Search Warrants.*

The several judges of the district courts of the United States, and the United States commissioners, may, within their respective jurisdictions, issue a search warrant, authorizing any internal revenue officer to search any premises within the same, if such officer makes oath in writing that he has reason to believe, and does believe, that a fraud upon the revenue has been or is being committed upon or by the use of the said premises.

APPENDIX B.

Rule 56, Federal Rules of Civil Procedure.

Rule 56. *Summary Judgment.*

(a) *For claimant.* A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) *For defending party.* A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for summary judgment in his favor as to all or any part thereof.

(c) *Motion and proceedings thereon.* The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law, a summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) *Case not fully adjudicated on motion.* If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) *Form of affidavits; further testimony.* Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits.

(f) *When affidavits are unavailable.* Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to

permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) *Affidavits made in bad faith.* Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

No. 14874.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CHARLES W. HOFFRITZ,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE.

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No. 14874.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CHARLES W. HOFFRITZ,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE.

I.

STATEMENT OF JURISDICTION.

This action was begun in the District Court with the filing on January 4, 1955 of an action captioned "Complaint for Temporary Restraining Order and Injunction—Suppression of Evidence, and Demand for Jury Trial." The complaint was accompanied by a "Motion for Preliminary and Temporary Injunction" [Tr. p. 9] and "Affidavit in Support of Motion for Preliminary and Temporary Injunction" filed by appellant [Tr. p. 10]. Affidavits were filed on behalf of all parties. On March 29, 1955, the District Court entered an "Order on Motion

under Rule 41(e) of Federal Rules of Criminal Procedure” [Tr. p. 50] which denied appellant all relief sought. Findings of Fact and Conclusions of Law were made [Tr. pp. 54-58] and on April 19, 1955 judgment was entered accordingly [Tr. pp. 58, 59]. Appellant made a Motion for New Trial [Tr. p. 60] which motion was denied [Tr. pp. 66-67]. Notice of Appeal was filed June 27, 1955 [Tr. p. 67].

The District Court had jurisdiction of this cause of action under Rule 41(e) of the Federal Rules of Criminal Procedure, Title 18, United States Code, and this Court has jurisdiction under Section 1291, Title 28, United States Code.

II.

STATUTE INVOLVED.

Rule 41(e) of the Federal Rules of Criminal Procedure, Title 18, United States Code, provides in pertinent part:

“(e) Motion for Return of Property and to Suppress Evidence.

“A person aggrieved by an unlawful search and seizure may move the District Court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant . . .”

III.

STATEMENT OF THE CASE.

In essence, appellant contended in the District Court that his consent to examine his books and records was obtained by Special Agent Irwin R. Weiss of the Internal Revenue Service by deceit.

The facts viewed most favorably to appellant, as revealed in his affidavit, reveal that on or about April 14, 1953 Agent Weiss visited appellant's office at the Glo-Dial Clock Company. Appellant was not present but his employee, Dorothy Varble, telephoned him and said, "There was a government man in the office who wanted to look at the books." [Tr. p. 35.] According to appellant he then spoke to Agent Weiss over the telephone and "Mr. Weiss said that he wanted to look over the books for 1947 and 1948 again." Certain books were thereafter made available to Mr. Weiss and during the ensuing two or three week period he visited appellant's office almost daily. At one point during the investigation appellant was asked if he had a copy of his 1952 income tax return. [Tr. p. 32.]

The affidavit of Special Agent Weiss, supported by the affidavit of Mrs. Dorothy Varble, appellant's bookkeeper and employee at the time, reveals that when Agent Weiss first visited the office on April 14, 1953, he advised appellant over the telephone that he had been assigned to conduct an investigation of appellant's income tax liabilities and that appellant told Agent Weiss that he could have all his books and records for examination. [Tr.

p. 15.] Appellant then instructed Mrs. Varble by telephone to give Agent Weiss "whatever he wanted." [Tr. p. 24.] Certain records were then turned over to Agent Weiss and when appellant arrived at the office later that morning Agent Weiss advised him that he was conducting an investigation of this income tax liabilities for the year 1948 through 1951 and exhibited to appellant his credentials which revealed he was a special agent of the Treasury Department. [Tr. p. 16.] During the course of the examination appellant was extremely friendly to Agent Weiss and made all his records available to him including his 1952 income tax return. [Tr. pp. 17, 25, 26.] Agent Weiss neither attempted, nor did in fact, deceive or misrepresent his capacity and purpose to appellant. [Tr. p. 18.] The investigation of appellant's books and records revealed no evidence of fraud, but later investigation outside of the books and records revealed large amounts of unreported income. [Tr. p. 19.]

Special Agent Weiss also filed an affidavit which described his duties as a special agent of the Intelligence Division, Internal Revenue Service. [Tr. pp. 38, 41.] It revealed that out of several hundred "preliminary" investigations—the type he had begun in appellant's case—only a handful result in criminal prosecution. [Tr. p. 40.] Further, both "Special" agents and "Revenue" agents conduct preliminary investigations. [Tr. p. 39.]

IV.

APPELLANT'S SPECIFICATIONS OF ERROR.

At pages 4 through 6 of Appellant's Opening Brief, he has made the following specifications of error:

"(1) Holding that appellant's civil action was a motion for return of property and to suppress evidence pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure, instead of following Rule 56 of the Federal Rules of Civil Procedure;

"(2) Holding that the action arises out of the District Court's power to discipline an officer of the court and is equitable in nature, and that pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure, the motion should be heard and tried upon the facts by the court, without a jury;

"(3) Finding that appellant gave Special Agent Weiss permission to examine his books and records and imposed no limitation on his consent;

"(4) Holding that the failure of Special Agent Weiss to advise appellant of his rights under the United States Constitution, Amendment V, not to be a witness against himself, does not render appellant's consent to examine his books involuntary;

"(5) Holding that the failure of Special Agent Weiss to advise appellant that a criminal investigation was pending was not a stratagem amounting to unlawful search and seizure within the meaning of the United States Constitution, Amendment IV;

"(6) Holding that appellant, as a reasonable man, is held to understand that when he gave his permission to inspect his books and records to an investigator charged with enforcing the law, and placed no limitations on such permission, he permits the

inspection for all purposes relevant to the inquiry, including evidence of wilful tax evasion;

“(7) Holding that appellant’s right to be free from unlawful search and seizure under the United States Constitution, Amendment V, was not violated;

“(8) Holding that appellant was not involuntarily compelled to be a witness against himself;

“(9) Holding that appellant’s consent to examine his books and records was voluntarily and understandingly made, was not revoked, and continued to be voluntary during the period of investigation of his books and records by Special Agent Weiss;

“(10) Finding that appellant’s civil action for the return of personal property was a motion pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure;

“(11) Hearing the matter upon affidavits, depriving appellant of the trial of a civil action upon oral evidence and its merits.

“(12) Denying appellant’s motion for a temporary injunction restraining the appellees from doing any of the acts mentioned in Paragraph 1 of appellant’s prayer for relief in his complaint;

“(13) Refusing to order the return of all transcripts of books, papers, documents, records, and information obtained therefrom by Special Agent Irwin R. Weiss and belonging to appellant;

“(14) Refusing to order the suppression of all of the property mentioned in Paragraph (13) herein as evidence.”

V.
ARGUMENT.

POINT ONE.

The Jurisdiction of the District Court.

Appellee does not dispute the *fact* of jurisdiction in the District Court to entertain appellant's motion and grant the relief sought in an appropriate case.

Freeman v. United States (9th Cir., 1946), 160 F. 2d 69.

However, most of the courts which have passed upon such actions have not made clear the exact basis of jurisdiction. Prior to the adoption of the Federal Rules of Criminal Procedure, there was no express provision in federal law for the suppression and return of evidence obtained illegally without a search warrant. Former Section 626 of Title 18, United States Code, was not broad enough in its terms to cover such situations. The result, therefore, was that the courts resorted to such expressions as "the inherent power of the court" to discipline its officers.

Go-Bart Importing Co., et al. v. United States, 282 U. S. 344 (1931).

Some of the language referring to the inherent power of the court was carried on into cases subsequent to the adoption of the Rules. Thereafter, in a case decided in 1952, the Fifth Circuit Court of Appeals, held Rule 41(e) of the Federal Rules of Criminal Procedure covered the preindictment situation. The court stated without further discussion in *White, et al. v. United States, et al.*, 194 F. 2d 215, 216:

"This appeal is from an order denying petitions and motions filed by petitioners under Rule 41(e),

Federal Rules of Criminal Procedure, 18 U. S. C. A., for the return of property and to suppress evidence.”

This was followed by *Centracchio v. Garrity*, 198 F. 2d 382 (1st Cir., 1952), where the court observed that Rule 41(e) of the Federal Rules of Criminal Procedure made provision for pre-indictment motions to suppress evidence. In that case the court stated at page 387, discussing the district court’s jurisdiction:

“This rule does not specify the time when such a motion may be made, and presumably it is broad enough to sanction the filing of such a motion in a district court prior to indictment.”

It thus appears that with the adoption of the rules, a specific statutory provision was made for a motion to suppress evidence and return property, taken illegally without a warrant, prior to indictment. Rule 41(e) provides:

“A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained”

In the instant case, appellant filed a “Complaint for Temporary Restraining Order and Injunction—Suppression of Evidence, and Demand for Jury Trial.” [Tr. p. 3.] It is axiomatic, of course, that the title of a proceeding does not determine its character.

Freeman v. United States, supra.

Thus, the district court correctly ruled “that the action is properly to be treated as a motion pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure permitting ‘motion for return of property and to suppress evidence.’ ” [Tr. pp. 50, 51.]

An order of a district court granting or denying a motion to suppress evidence and for the return of property, if made prior to the indictment, is a final decision and appealable.

United States v. Rosenwasser, 145 F. 2d 1015 (9th Cir., 1944);

Freeman v. United States, *supra*;

Weldon v. United States, 196 F. 2d 874 (9th Cir., 1952).

Nevertheless, the question arises in this case of whether the appeal has become moot by virtue of the return of an indictment against the appellant on August 31, 1955. [Tr. p. 75.] There is little authority on the subject. The First Circuit Court of Appeals discussed the problem in the *Centracchio* case, *supra*, and stated at pages 388 and 389:

“We have considered somewhat whether the handing down of the indictment on February 21, 1952, rendered this appeal moot. It is a curious situation. The fact that the petition to suppress was filed as an independent proceeding prior to indictment was the only thing that made the district court’s order thereon a ‘final decision’ appealable under 28 U. S. C. §1291. If the motion to suppress had been filed after indictment, for the sole purpose of procuring the exclusion of evidence at a forthcoming trial, an order denying such motion would not have been a ‘final decision’ but rather an unappealable interlocutory order entered in the course of the criminal case. *Cogen v. United States*, 1929, 278 U. S. 221, 49 S. Ct. 118, 73 L. Ed. 275. But presumably if the order of the district court was a ‘final decision’ when rendered, it did not lose that characteristic from the fact that an indictment was subsequently handed

down. Cf. *United States v. Poller*, 2 Cir., 1930, 43 F. 2d 911. And though the finding of a true bill by the grand jury defeated one of the objects of petitioner in his motion to suppress, the petition did not thereby become entirely moot, for petitioner still remained interested in the relief sought in so far as it might be directed to the suppression of the evidence at the trial. Probably, therefore, as a technical matter, the present appeal should not be dismissed as moot."

On the other hand, logic strongly compels the conclusion that this appeal has, in fact, become moot. In the *Rosenwasser* case, *supra*, this court discussed the reasoning of the Supreme Court in *Cogen v. United States*, 278 U. S. 221 (1929). In both the *Cogen* and *Rosenwasser* cases, there was an appeal from a district court's order on a motion to suppress evidence and return property made after indictment. Both cases determine that such an order was not appealable. This court observed in the *Rosenwasser* case at page 1017:

"The Supreme Court emphasized the fact that the suppression of evidence, not the return of the papers, was the principal purpose of defendant's application."

If this criteria is to be used to determine what is left of appellant's appeal in this case, then the appeal has become moot. While the complaint includes an action for the return of property, an examination of the affidavits of all parties reveals that no property was taken and thus, the action in this case is simply one to suppress evidence. Therefore, in the reasoning of the *Cogen* and *Rosenwasser* cases, a remedy remains available to the appellant in the district court.

POINT TWO.

No Constitutional Rights of Appellant Were Violated.

It should be noted at the outset that appellant is not here contending that there was an *actual* illegal search or inspection of his books. That is, appellant does not claim that there was an unlawful and surreptitious entry into his place of business. Appellant admits that he consented to an inspection of his books and records but contends that his consent was obtained by fraud.

It is indisputably settled law that no "warning" of constitutional rights is necessary before interviewing a prospective defendant or examining his books and records. A failure to give such a warning does not render his statements or the information gained from his records inadmissible in a later criminal prosecution.

Powers v. United States, 223 U. S. 303;

United States v. Burdick, 214 F. 2d 768 (C. C. A. 3, 1954);

Montgomery v. United States, 203 F. 2d 887 (C. C. A. 5, 1953).

In the *Burdick* case, at page 773, the Court said:

" . . . The motion to suppress was based upon the claim that when the above data and information was submitted to Special Agent Gerson, the latter allegedly failed to warn the defendant that he did not have to testify against himself nor give any information that might be used against him in a criminal proceeding."

The "data and information" referred to included certain bank and brokerage records of the defendant, a net worth

statement and some oral admissions. The court then quoted from the *Powers* case to the following effect:

“It is well settled that it is ‘. . . not essential to the admissibility of his [defendant’s] testimony that he should first have been warned that what he said might be used against him’, providing that the defendant’s statement ‘. . . was entirely voluntary and understandingly given. Such testimony cannot be excluded when subsequently offered at his trial.’”

The *Montgomery* case, another income tax case, also involved a failure to warn of constitutional rights. The court said, page 893:

“We do not think the circumstances under which the statements of the defendant and of his wife, and the cancelled checks and documents, were obtained were sufficient of themselves to require that that evidence be excluded on the ground of being involuntary as a matter of law, or to require that the Government’s Exhibit 20 based in part upon such testimony be not admitted in evidence. All these circumstances were matters which went to the weight or credibility of the testimony thus obtained [citations].”

In another income tax case, *Turner v. United States*, 222 F. 2d 926 (C. C. A. 4, 1955), the court observed at page 931:

“It has been expressly held time and again in tax evasion and other criminal cases that it is not essential to the admissibility of statements secured by officers of the law from a defendant that he should be first warned that the information might be used against him in a criminal case, provided that it was voluntarily and understandingly given . . .”

The Ninth Circuit Court of Appeals has indicated its agreement with the cases just noted. In the income tax case of *Himmelfarb v. United States*, 175 F. 2d 924 (1949), the court said in discussing this problem at page 938:

“ . . . If a warning was necessary, *which we question*, we think the trial court’s holding was correct.” (Emphasis added.)

After this contention concerning “warning” was rejected time and again by the Circuit Courts of Appeals, the taxpayers accused of evasion took a slightly different tack: where fraud was suspected the failure to “warn” or the failure to advise the taxpayer that he was under suspicion amounted to a concealment, *i. e.*, fraud on the part of the government agents. Thus, they argue, the statements made by the taxpayer or his consent to examine his books and records becomes involuntary. That is the gist of appellants argument here. But it is only a different chorus to the same old song, and the Circuit Courts of Appeals have consistently rejected the contention.

Conspicuously absent from appellant’s citations of authorities are the many income tax cases determining the exact point raised in this appeal. *Chieftain Pontiac Corp., et al. v. Julian, United States Attorney*, 209 F. 2d 657 (C. A. 1, 1954), involved a pre-indictment action to suppress evidence in a tax case where a taxpayer had made a voluntary disclosure. The court observed at page 659:

“Even if the government agents obtained the voluntary disclosures from the appellants by the guile of a false representation that no investigation was pending and that appellants were therefore eligible to obtain the benefit of the Treasury’s disclosure policy, still we think it could not be said that such

stratagem constitutes an unreasonable search and seizure within the meaning of the Fourth Amendment.”

In the *Montgomery* case, *supra*, which was reversed on other grounds, the court disposed of this contention in the following language (p. 892):

“ . . . Special Agent Baskett testified that the defendant was never so warned and that he never at anytime told the defendant that any document that was surrendered to him or his fellow agents would be used in either a civil or criminal prosecution against him. The defendant testified that, when Baskett and Government Agent Wilson first came to see him about his income tax matters, they told him that it was a routine check-up, and that on each occasion he conferred with them, they told him it was purely a civil matter, that they would soon let him know how much taxes he owed, if any, and allow him to pay them and that at no time was it intimated to him that there might be a criminal prosecution”

(P. 893):

“We do not think the circumstances under which the statements of the defendant and of his wife, and the cancelled checks and documents, were obtained were sufficient of themselves to require that that evidence be excluded on the ground of being involuntary as a matter of law”

And in *Blumberg v. United States*, 222 F. 2d 496, 499 (C. A. 5, 1955):

“We are convinced, however, that the record, including the testimony of the defendant himself, contains no evidence supporting the claim made on this

appeal, that the examinations made of him, his books and records were conducted without his consent.

. . .

“It is true that there was no expressed disclosure made that a purpose in obtaining the evidence was to proceed criminally against him. On the other hand, though defendant had undoubtedly hoped, and may have believed, that no criminal prosecution was intended, there was no representation made to him that the information sought was only for purposes of settling his civil liability. Under these circumstances, we think: that there was no obligation on the agents to inform him that the matters inquired about might be used in a criminal proceeding; . . .”

The Fourth Circuit Court of Appeals has ruled to the same effect in *Turner v. United States*, 222 F. 2d 926 (1955):

(P. 929): “Investigation by a special agent may or may not lead to a criminal prosecution, and in this case it was Forbes’ duty and doubtless his intention to report any delinquencies which he might find to his superiors. He did not give any information on this point to the partners and on cross examination was unable to say whether or not he had told them that he was making a routine ‘check-up’.

.

(P. 930): “The contention seems to be that revenue agents who secure the consent of a taxpayer to an examination of his books with intent to obtain evidence and use it in a criminal prosecution, are guilty of deceit unless they divulge their purpose, and that the obtaining of information in such a manner violates the Fourth Amendment and its introduction into evidence violates the Fifth Amendment; . . .

.

(P. 931): "At no time did the agents bring pressure to bear upon the defendants or conceal their identity or practice any deceit. The evidence is silent as to whether Agent Forbes began the investigation as a routine examination to ascertain the civil liability of the defendants or intended from the beginning to search for evidence of crime. *But even if the latter assumption be made, there was no violation of the taxpayer's constitutional rights.* The relevant inquiry is always whether the taxpayer freely gave his consent, and as to that there is no dispute in this instance." (Emphasis added.)

A particularly illuminating district court case from Pennsylvania is *United States v. Guerrina*. In an early opinion at 112 Fed. Supp. 126, the court suppressed certain evidence. That opinion is summarized by appellant in his brief at pages 23 and 24. However, the district court at 126 Fed. Supp. 609, modified its early decision and freed from suppression much of the material covered and at the same time brought its reasoning in line with the other authorities. At page 610, the court said:

" . . . the question as to whether the defendant consented to the examination of his check-stubs and other records which he himself made available to the agents, without first being warned of his constitutional rights, is one that cannot be determined preliminarily as a matter of law but is one which must be determined as a question of fact by the jury at the trial."

The court then cites the *Burdick* and *Montgomery* cases and states:

" . . . the facts in each of those cases clearly demonstrate that criminal prosecution was contemplated at the time the defendants were questioned by

special agents of the Internal Revenue Bureau. The import of the decisions in the Burdick and Montgomery cases, *supra*, is that failure to warn the defendants of their constitutional rights before questioning them as to their potential tax liability does not *per se* and as a matter of law render their admissions involuntary.”

The Ninth Circuit Court of Appeals passed upon a tax case in 1955 and its decision in that case is really dispositive of appellant’s contentions here. In *Legatos v. United States*, 222 F. 2d 678 (C. A. 9, 1955), the court said (p. 683):

“Legatos further complains that he was misled into believing that only a routine, civil liability, investigation was being made of his tax returns and that he was not informed until after his voluntary disclosure that criminal prosecution was contemplated. . . . Usually, when an investigation is started, it is not possible to predict where it will lead or whether or not evidence of fraud sufficient to justify prosecution will be uncovered. . . . No government agent made any promise of immunity from prosecution to appellants, or gave them any good reason to believe that prosecution would not be instituted. And since appellant Glynn gave the challenged documentary evidence to a government agent before any effective voluntary disclosure had been made, no constitutional rights of appellants were violated. [citations.]”

For other cases to the same effect see:

Vloutis v. United States, F. 2d 782 (C. A. 5, 1955);

Benes v. Canary, 224 F. 2d 470 (C. A. 6, 1955);

Scanlon v. United States, 223 F. 2d 382 (C. A. 1, 1955).

Appellant's entire argument in this case rests upon the assumption that it is unlawful to obtain evidence from a taxpayer's own words, acts and records without advising him that he is under a criminal investigation, if such be the case. This is certainly not the law. As expressed by the Seventh Circuit Court of Appeals in *United States v. O'Brien*, 174 F. 2d 341, 346 (1949):

“ . . . police officers are not required to be too polite. They may match wits with alleged criminals, and in the absence of coercive, abusive tactics, obtain evidence for use in the prosecution.”

In *On Lee v. United States*, 343 U. S. 747 (1952), while the defendant was on bail an old friend and former employee went to the defendant's place of business. He entered the defendant's establishment with a microphone concealed upon his person and engaged the defendant in conversation. The Supreme Court held that the defendant's incriminating statements made during that conversation were admissible evidence. It goes without saying that the defendant was not advised that he was giving evidence against himself in a criminal case. On the subject of suppressing evidence generally, the court observed at page 757:

“The trend of the law in recent years has been to turn away from rigid rules of incompetence, in favor of admitting testimony and allowing the trier of fact judge the weight to be given it.”

In this case, government agents even met the more rigorous standard of the dissenters in *On Lee*. The dissenters do not suggest that evidence should be excluded which was obtained by a law enforcement officer while observing and listening on premises he lawfully entered.

See also:

Goldman v. United States, 316 U. S. 129;

Olmstead v. United States, 277 U. S. 438.

Appellant cites many cases in his brief in an attempt to demonstrate that he was the victim of an unlawful search. But the cases relied upon either involve a “masquerade”,

Catalanotte v. United States, 208 F. 2d 264 (6 Cir., 1953);

Gouled v. United States, 255 U. S. 298 (2 Cir., 1921),

or they involve a consent to search obtained by duress or coercion.

Judd v. United States, 190 F. 2d 649 (C. A. D. C., 1951).

Nowhere in the record of this case is there a suggestion that Agent Weiss represented himself to be anything but a government agent, and nowhere in the record is there a suggestion that the appellant was forced or coerced into making his books available to the agents.

Against this background of case law the district court correctly ruled [Tr. p. 53]:

“(9) that assuming all of plaintiff’s allegations to be true, and in particular that Special Agent Weiss knew that fraud was suspected but did not inform plaintiff that the purpose of the investigation was to acquire evidence for a criminal prosecution, nevertheless plaintiff’s constitutional rights to be free from ‘unreasonable searches and seizures’ and from being ‘compelled . . . to be a witness against himself’ were not violated [U. S. Const., Amend. IV, V]; and

“(10) that ‘even if the Government Agents obtained the voluntary disclosures . . . by the guile of a false representation that no investigation was pending . . . it could not be said that such a stratagem constitutes an unreasonable search and seizure within the meaning of the Fourth Amendment.’ [Chieftain Pontica, Corp. v. Julian, *supra*, 209 F. 2d at 659-660; accord United States v. American Stevedores, 16 F. R. D. 164, 171 (S. D. N. Y. 1954); see Bolles v. Chew, 53 F. Supp. 787 (N. D. Cal., 1944).]”

No constitutional rights of appellant were violated.

POINT THREE.

Appellant Was Not Erroneously Denied a Hearing by the District Court.

A. There Was Nothing for the Court to “Hear.”

Regardless of whether the proceeding in the District Court is viewed as a motion under Rule 41(e) of the Federal Rules of Criminal Procedure or as a civil action terminating in a summary judgment under Rule 56 of the Federal Rules of Civil Procedure, the district court was not called upon to conduct a hearing. It would have been superfluous. The district judge ruled, based on the authorities, “that assuming all of plaintiff’s allegations to be true” [Tr. p. 53] none of his constitutional rights were violated. Thus, the court ruled that appellant was not entitled to the relief sought *on his own moving papers*.

But even if the district court had been called upon to decide the motion on affidavit, it would present no innovation in procedure under Rule 41(e). Traditionally,

district courts have determined such motions in that manner. As expressed by the District Judge in this case [Supp. Tr. p. 2].

“ . . . the court may, if it decides it is desirable, take oral testimony.”

In his brief at page 31, appellant cites the case of *United States v. Manno* (D. C. Ill., 1954), 118 Fed. Supp. 511, in support of a different proposition. But the court's language at page 516 as quoted by appellant should receive careful attention:

“In the opinion of the Court, this controversy needs to be resolved by evidentiary proof.”

Thus, the court in the *Manno* case is really saying the same thing as the District Judge in this case. The court does not say that there *must* be evidentiary proof but only that he deems it desirable in that case.

Appellant also seeks to rely upon the case of *United States v. Warrington*, 17 F. R. D. 25, which disapproves use of affidavits in motions under Rule 41(e). But appellant himself selected the course of action in the instant case when, contrary to *Warrington*, he filed an initial affidavit in support of his motion. [Tr. p. 10.]

B. Appellant Was Afforded an Opportunity for a Hearing and Waived It.

The Supplemental Transcript of Record, pages 2 and 3, reveal that an opportunity to produce oral testimony was given appellant and he declined to take advantage of it. The transcript reveals, page 2, that counsel for defendants offered to produce oral testimony, and opportunity to

cross-examine, from the persons who had made affidavits in the case. The court then addressed counsel for appellant:

“The Court: Do you wish to examine them?

Mr. Laven: Well, I presume this is on affidavit. These motions are usually . . .

.

Mr. Laven: I don't wish to cross-examine on their affidavits that they made . . .”

Thus, appellant was given an opportunity for the hearing he now complains was denied him.

VI.

CONCLUSION.

No constitutional rights of appellant were violated and the judgment of the District Court should be affirmed.

Respectfully submitted,

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No. 14874

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CHARLES W. HOFFRITZ,

Appellant,

vs.

UNITED STATES OF AMERICA, LAUGHLIN E. WATERS,
United States Attorney, and IRWIN R. WEISS,

Appellees.

APPELLANT'S REPLY BRIEF.

FILED

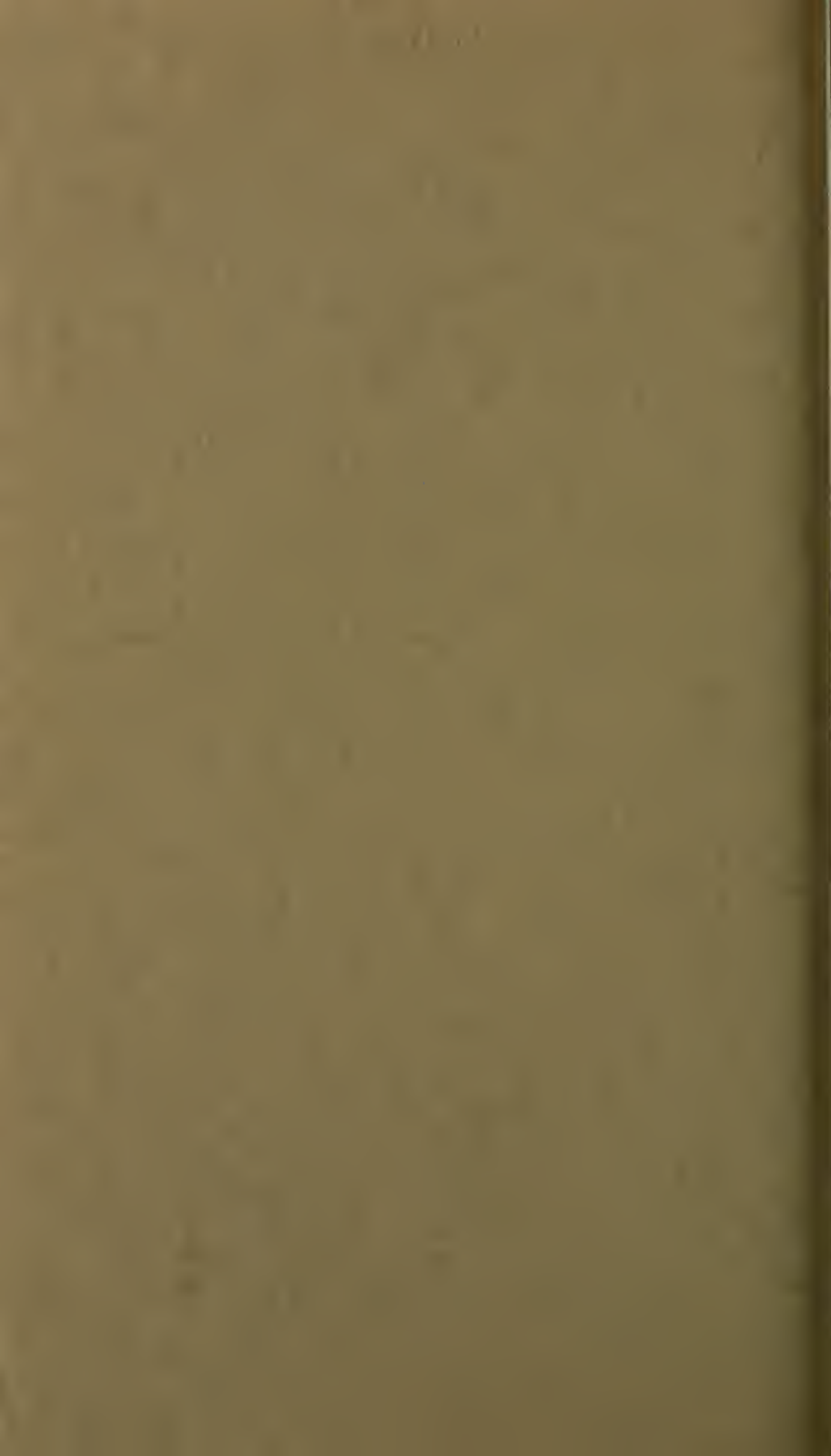
MAY 12 1956

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APPELLANT'S REPLY BRIEF.

Preliminary Statement.

This brief would be unduly extended unless it were largely confined to replying to appellee's principal contentions, with as little repetition as possible of the argument set forth in appellant's brief heretofore filed. Accordingly, failure to comment in this brief upon a particular statement of facts or assertion by appellee is not necessarily to be construed as acquiescence therein.

The appellee attempts to recite the facts most favorable to the appellant by carefully selecting a few excerpts, omitting those statements which were uncontroverted by the government in its opposing affidavits.

These facts are set forth on pages 7 and 8 of appellant's brief, and establish fraud and deceit on the part of Special Agent Weiss, and therefore it is unnecessary to repeat them again.

ARGUMENT.

I.

Appellee Admits Jurisdiction of the District Court.

Appellee concedes that the District Court had jurisdiction to grant the relief sought in an appropriate case, but fails to define it.

The complaint in the instant case was a civil action for the return of property and a permanent injunction against its use in any future criminal proceedings [Tr. 4]. No criminal proceedings had been filed or were pending during the entire proceedings in this case.

The Notice of Appeal herein [Tr. 67] was filed on June 27, 1955, prior to the indictment, which was not returned until August 31, 1955 [Tr. 75].

The various Circuit Courts do hold that it is the beginning of the proceedings which determines the appealability of the order. (*See Nelson v. United States* (D. C. Cir., 1953), 208 F. 2d 505, 516-517.) However, the courts are in accord that if there is a triable issue presented by the affidavits, a hearing shall be had before trial to determine whether the evidence has been obtained in violation of an individual's Constitutional rights. See *United States v. Sinerio* (3rd Cir., 1951), 190 F. 2d 397, cert. den., 343 U. S. 814.

It is obvious that the present case comes within the holdings of *In re Fried* (2nd Cir., 1947), 161 F. 2d 453, cert. den., 331 U. S. 858, and *Weldon v. United States* (9th Cir., 1952), 196 F. 2d 874, which expressly approves the procedure which was followed in the instant case.

In the case of *In re Fried* (2nd Cir., 1947), 161 F. 2d 453, cert. den., 331 U. S. 858, the precise question that

confronted the court was whether a hearing had been improperly denied to a petitioner who sought to suppress a confession. The court held that a motion to suppress would lie before indictment. Two of the judges who constituted the majority, Learned Hand and Frank, disagreed as to the scope. Judge Frank deemed it applicable to any allegedly illegally obtained confession, while Judge Learned Hand would limit it to confessions obtained in violation of the Fifth Amendment.

In the *Weldon* case the court said at page 875:

“If Seth had been indicted or informed against, and if the resulting criminal action had been pending when the petitions were filed, Seth’s petition would have been merely incidental to the criminal action
* * * Actually, as stated above, Seth was not indicted or informed against; hence, no criminal action was pending against him when the petitions were filed. Hence both petitions were independent proceedings. Obviously, these were civil proceedings, in effect civil actions, to recover personal property and to enjoin an allegedly wrongful use.”

A careful analysis of the facts in each of the cases cited by appellee clearly demonstrates that each case was decided on facts different from those in the instant case, and therefore are not applicable.

In *Powers v. United States*, 223 U. S. 323, the defendant voluntarily took the witness stand and became a witness before the Court Commissioner, and testified.

The cases of *United States v. Burdick*, 214 F. 2d 768; *Montgomery v. United States*, 203 F. 2d 887; *Turner v. United States*, 222 F. 2d 926; and *Himmelfarb v. United States*, 175 F. 2d 924, cited by appellee, do not support its position, because in each of those cases the suspected

taxpayer was given an opportunity to refuse to answer any question that was propounded to him by the government agent, and was advised that any admission made would be voluntary. Also, the decisions avoided deciding the issue of waiver of Constitutional rights directly by stating that this was a question of admissibility and the weight of the evidence.

The case of *Blumberg v. United States* (5th Cir., 1955), 222 F. 2d 496, 499, relied upon by appellee, is factually distinguishable and does not support appellee's contention, because in that case it was held that the defendant, voluntarily and without any reservations, discussed the matter of his tax liability frankly and fully with a government agent in an effort to reach an agreement as to such liability and obtain a settlement thereof. Needless to say, this judgment of conviction was reversed on other grounds.

Under the Fifth Amendment, it is not permissible to compel any person in any criminal case to be a witness against himself; yet the law requires every taxpayer to make and file income tax returns and to permit his records of income to be examined by government agents, and such required evidence is admissible against the taxpayer in a criminal action if the taxpayer fails to claim his Constitutional privilege when the information is required of him. However, when the taxpayer does waive his Constitutional privileges, such waiver must be intentionally made after he has had a knowledgeable and understanding choice between waiving and standing upon them. (See *Ray v. United States* (5th Cir., 1936), 84 F. 2d 654, 656.)

In the instant case, Special Agent Weiss never gave the appellant the choice of refusing to answer any question

or giving him any books and records; and also, Special Agent Weiss suppressed the fact that he was seeking evidence for a criminal prosecution.

The appellee also cites the case of *United States v. Vloutis* (5th Cir., 1955), 219 F. 2d 782, which likewise is not in point, for the reason that in that case it does not appear that the Revenue Agent and Special Agent, at the time they called upon the bookkeeper of the defendant, had been informed that a criminal violation had been committed. They obtained permission from the bookkeeper and the partner to inspect the books. It should be noted that the case was reversed and the matter remanded with instructions to grant appellant's motion for acquittal on Counts Two and Four and his motion for a new trial on Counts One and Three.

In *Benes v. Canary* (6th Cir., 1955), 224 F. 2d 470, the court at 472 said:

"The ruling upon the issue of unlawful search and seizure depended largely upon the interpretation to be given to certain testimony of the appellant, together with an evaluation of the credibility of the witnesses."

The case of *Scanlon v. United States* (1st Cir., 1955), 223 F. 2d 382, likewise does not support the government's position, because the court stated at 384:

"* * * The net worth statement was signed at the request of a Revenue Agent, but there is no evidence of any duress, coercion, fraud, or trickery employed by the government in obtaining it, and the trial court so found."

Appellee seeks to make some point to the effect that the appeal is moot, claiming that there is no property to

be returned, although admitting that the complaint does include an action for the return of property, and relies upon the reasoning in *Cogen v. United States*, 278 U. S. 221, and *United States v. Rosenwasser* (9th Cir., 1944), 145 F. 2d 1015. However, it is believed that the language in the *Rosenwasser* case following the quotation cited by appellee is an answer to the appellee's contention, wherein the court said:

"We believe the reasoning of the *Cogen* case determines the result in the instant case, as there are no essential factors in the one distinguishing it from the other, and it should be noted that in each of the instances, they were not separate proceedings, but were taken while the criminal actions were pending."

In Paragraph V of the complaint [Tr. 6], it is alleged that Special Agent Weiss made a transcript of the books and records, checks, receipts, invoices, etc. * * *, and in the prayer, in paragraph 3, appellant asks for an order to return all of the transcripts and copies of records, books, invoices, checks, and other physical records and objects.

The case of *Silverthorne Lumber Co. v. United States*, 251 U. S. 385, answers appellee's contention that the appeal has become moot because no property was taken from the appellant. In that case, the defendants had been indicted and arrested, and while they were detained, officers went to the company's offices and took all the books, papers, and documents and photographed them. The District Court ordered that the search and seizure by the officers violated the Constitutional rights of the parties and further ordered the indictment dismissed. A new indictment was returned, based upon the information thus obtained, and the Supreme Court held that under these

circumstances the government was neither entitled to use the original documents nor any knowledge obtained therefrom, and said at page 392:

“The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall be used before the court, but it should not be used at all.”

See also:

Gouled v. United States, 255 U. S. 298, 307;

Nardone v. United States, 308 U. S. 338, 380.

II.

The Record Does Not Support the Trial Court's Finding That Appellant Understandingly and Knowingly Waived His Constitutional Rights.

The appellee attempts to distinguish between an actual illegal search and seizure and a situation where one has waived his Constitutional rights and consented to a search by fraud and deceit.

Under the decisions, there appears to be no such distinction; and it is significant to note that appellee has not cited any authority in support of its position.

Self-incrimination is the same whether raised under the Fourth or the Fifth Amendment.

United States v. Jeffers, 342 U. S. 48, 72 S. Ct. 93;

McDonald v. United States, 335 U. S. 451, 69 S. Ct. 191.

A search and seizure carried out by fraud and deceit is equally violative of Constitutional rights whether made subsequent to entry by force and violence or to entry procured by stealth and fraud.

Gouled v. United States, 255 U. S. 298, 305-306.

In the case of *Fraternal Order of Eagles No. 778 v. United States* (3rd Cir., 1932), 57 F. 2d 93, at 94, the court said:

“A search made as the result of an entry by physical force is not necessary in order to violate the Fourth Amendment. That Amendment was designed to protect the individual against the abuse of official authority. Search and seizure following an entry into the house or office of a person suspected of crime by means of fraud, stealth, * * * are unreasonable and violative of the Fourth Amendment.”

See also:

United States v. Mitchneck (D. C., 1933), 2 Fed. Supp. 224;

United States v. Guerrina (D. C. E. D., Pa., 1953), 112 Fed. Supp. 126, 128.

Basically, the crucial issue in this case is whether the appellant was deprived of his Constitutional rights under both the Fourth and Fifth Amendments by the conduct of the Special Agent, and whether his waiver of these privileges was understandingly and knowingly given.

The authorities are all in accord that it must appear that the consent was freely and voluntarily given.

Kovach v. United States (6th Cir., 1931), 53 F. 2d 639.

In *Turner v. United States* (4th Cir., 1955), 222 F. 2d 926 at 931, the court says that the relevant inquiry is always whether the taxpayer freely gives his consent, and as to that there is no dispute.

Appellee makes mention that appellant failed to cite *Chieftain Pontiac Corp. v. Julian* (1st Cir., 1954), 209 F. 2d 657, but neglects to point out that this case was dis-

missed by the Court of Appeals for lack of jurisdiction, because the appellant therein attempted to appeal while a motion to vacate an order and make findings was still pending in the lower court.

See Judge Woodbury's concurring opinion, page 660.

III.

The Appellant Had No Notice That the Court Was Proceeding Under Rule 41(e), Federal Rules of Criminal Procedure, Instead of Rule 56(c), Federal Rules of Civil Procedure.

Appellee finally maintains that appellant was given a hearing and contends that there was nothing to hear, placing reliance upon *Centracchio v. Garrity* (1st Cir., 1952), 198 F. 2d 282, 289; *Benes v. Canary*, *supra*, and other cases, in all of which hearings were granted.

See also:

United States v. Lipshitz (E. D., N. Y., 1954), 117 Fed. Supp. 466, 468, and (1955), 132 Fed. Supp. 519;

United States v. Wolrich (S. D., N. Y., 1955), 129 Fed. Supp. 528, 529.

In the instant case, it is significant that the proceeding in the lower court was commenced as a civil action for the return of property and a permanent injunction against its use in any further criminal proceedings. The appellant sought a trial to have a determination as to whether or not his Constitutional rights had been violated. This could not be accomplished on affidavits, because it cannot be determined whether a particular allegation was an expression of an opinion or an affirmation of a fact by a witness, which could be determined only upon the

facts and circumstances existing at the time that the statement was made.

Under Rule 56(c) of the Federal Rules of Civil Procedure, if the affidavits disclose a triable issue, the appellant is entitled to a trial. The rule of the lower court deprived the appellant of an important right at a trial to cross-examine adverse witnesses about crucial facts peculiarly within their knowledge, and to have a trial court observe their demeanor while testifying. It is obvious that the appellant's counsel was following Rule 56(c) of the Civil Rules when he stated, "Well, I presume this is on affidavits" (Appellee's Br. p. 22).

The record is silent as to any indication by the trial judge that the matter was to be heard under Rule 41(e) of the Federal Rules of Criminal Procedure instead of the procedure that is followed in an injunction suit, wherein the plaintiff of course has the usual right of any plaintiff to a trial on evidence, and not on affidavits.

See:

In re Fried (2nd Cir., 1947), 161 F. 2d 453, 460.

A preliminary injunction is preliminary to a hearing on the merits, and its purpose is not to determine any controverted rights but to prevent a threatened wrong or the doing of any act, pending the final determination of the action, whereby rights may be threatened or endangered, and to maintain things in the condition in which they are at the time until the issue can be determined after a full hearing.

See:

Rule 65, *Federal Rules of Civil Procedure*;

American Federation of Musicians v. Stein (6th Cir., 1954), 213 F. 2d 679, 683;

Benson Hotel Corp. v. Woods (8th Cir., 1948),
168 F. 2d 694, 696, 697;

Missouri-Kansas Texas R. Co. v. Randolph (8th
Cir., 1950), 182 F. 2d 996, 999.

An examination of the affidavits of both Special Agent Weiss and Dorothy Varble reveals that they are replete with conjecture and conclusions, which do not amount to evidence.

For example, Special Agent Weiss says [Tr. 16]:

“* * * Mr. Hoffritz saw that I was working at the records Mrs. Varble had previously given to me
* * * Mr. Hoffritz took these credentials in his hand and appeared to examine them * * *” [Tr. 17] “* * * The course of my examination of Mr. Hoffritz’ records was primarily that of any accountant * * *” [Tr. 18] “That at no time did your affiant attempt to, or in fact, deceive or misrepresent to Mr. Hoffritz his capacity as a Special Agent of the Bureau of Internal Revenue, but in fact did fully inform Mr. Hoffritz on several occasions that your affiant was directed to investigate Mr. Hoffritz’ tax obligations for the period commencing with the year 1948 through 1951, and your affiant fully believes that Mr. Hoffritz was willing to and most voluntarily turned over to your affiant for inspection all * * *” [Tr. 19] “* * * the books and records that your affiant reviewed and inspected during the course of his stay in Mr. Hoffritz’ office and place of business * * *.”

In his further affidavit, Special Agent Weiss said [Tr. 39]:

“I conduct the preliminary investigation of individuals and corporate taxpayers involving suspected

income and other tax fraud cases. When more definite information is secured of the possible evasion of income and other taxes, a case number for the case is secured, the cooperation of an Internal Revenue Agent is requested, and the investigation proceeds on a joint basis with the revenue agent. This may result in either civil or criminal proceedings. If the preliminary investigation by the Special Agent does not indicate a possible evasion of income and other taxes, but does indicate a tax deficiency, the investigation is turned over to the Internal Revenue Agents for their completion of the case.

“Internal Revenue Agents conduct preliminary investigations of individuals and corporate taxpayers, which in some instances involve suspected income and other tax fraud cases. When information is secured of possible fraud, the investigation is discontinued, a report is written and the cooperation of a Special Agent is requested, and the investigation then proceeds on a joint basis * * *.”

[Tr. 40]:

“On April 7, 1953, I was assigned to conduct an investigation of the income tax liabilities of Charles W. Hoffritz, doing business as Glo-Dial Clock Company, on a preliminary basis. The books and records of the Glo-Dial Clock Company were turned over to me on a voluntary basis by Mr. Hoffritz. During the audit of the books and records, which took place between April 14, 1953, and May 1, 1953, Mr. Hoffritz visited the office assigned to me on the premises of the company, several times a day, and discussed various topics on a voluntary basis, such as personal history, prior audits by the Internal Revenue Service, etc.”

It appears that the trial judge would have granted an injunction if appellant could have proved that he was entitled to it. An injunction will be granted to prevent a prosecutor from using evidence obtained in violation of one's Constitutional rights to accomplish that person's indictment.

For example, see:

GoBart Importing Co. v. United States, 282 U. S. 344, 51 S. Ct. 153;

Burdeau v. McDowell, 256 U. S. 465, 41 S. Ct. 574;

In such an injunction suit, the plaintiff, of course, has the right to a trial on evidence, not on affidavits, unless the record justifies a summary judgment.

In the instant case, no motion was made by the government for a summary judgment; and it is submitted that the conflicting factual matters contained in the several affidavits presented a genuine triable issue.

Conclusion.

Appellant respectfully submits that the District Court had jurisdiction of this cause, and that the fraud and deceit practiced by Special Agent Weiss were equivalent to a search and seizure in violation of appellant's Constitutional rights, and for all the reasons set forth.

The judgment should be reversed.

Respectfully submitted,

BERNARD B. LAVEN,

Attorney for Appellant.

No. 14875

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BEN GREENBLATT,

Appellant,

vs.

ERNEST R. UTLEY, Trustee in Bankruptcy for MOSES A.
FLEMING, a bankrupt,

Appellee.

APPELLANT'S OPENING BRIEF.

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FILED

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No. 14875

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BEN GREENBLATT,

Appellant,

vs.

ERNEST R. UTLEY, Trustee in Bankruptcy for MOSES A.
FLEMING, a bankrupt,

Appellee.

APPELLANT'S OPENING BRIEF.

The within appeal is from an adverse judgment of the District Court of the United States, Southern District of California, sitting at Los Angeles, in a plenary action predicated upon an alleged bankruptcy preference.

Statement of Pleadings and Facts as to Jurisdiction.

(a) *Contents of Pleadings:* The pleadings herein are contained in Volume I of the Transcript of Record. (All references herein, unless otherwise noted, refer to pages and lines in Volume I of said Transcript of Record.)

The complaint alleges that one Moses A. Fleming, against whom an involuntary petition in bankruptcy was filed and an adjudication consented to, was adjudicated a bankrupt and that the appellee, Ernest R. Utley, at the

first meeting of creditors, was appointed Trustee of the bankrupt's estate [p. 2, line 17]. That on the 19th day of February, 1953, said bankrupt was indebted to appellant in the sum of \$9,500.00 for (sub)division improvements installed on the real property belonging to the bankrupt [p. 3, line 6], and that on said date, the bankrupt assigned to appellant, payments in escrows, totalling said sum [p. 3, line 14]. That on said date said bankrupt was insolvent and that the appellant had reasonable cause to so believe and that the effect of said "delivery and payment" will enable the appellant to obtain a greater percentage of the debts owing to him, than other creditors of the same class [p. 3, line 20].

In answer thereto, the appellant as defendant, denied the material allegations of said complaint, as to the assignment of payments in escrow, the insolvency, knowledge thereof and effect thereof [p. 5, line 8], and as affirmative defenses, alleged that on the 12th day of December, 1952, the bankrupt was the beneficiary of a deed of trust in which appellant was Trustor, and which provides for the release of certain real property "one lot or parcel to be released upon the payment or release of \$500.00" [p. 6, line 3]. That on said date, the bankrupt orally agreed to credit such deed of trust with the sum of \$8,234.85, constituting the reasonable and agreed value of said (sub)division improvements installed on the real property belonging to the bankrupt, and as an additional affirmative defense, that any credit or transfer received by the bankrupt was effected more than four months prior to the adjudication in bankruptcy [p. 7, line 10], and that any such credit was for an existing consideration [p. 7, line 16], in that, at the time the same was transferred to or came into the possession of appellant, appellant was entitled

to and had a right of a mechanic's lien upon the property of said bankrupt, which lien and right thereto, was given up, released and relinquished by appellant at the time of and contemporaneously with the credit or receipt by him of any of the assets of the bankruptcy [p. 8, line 4].

(b) *Jurisdiction of the District Court*: The jurisdiction of the District Court herein, of necessity, must be predicated upon the statutory provision of the Bankruptcy Act, since diversity of citizenship is entirely lacking. Originally, jurisdiction in plenary actions was predicated upon Title 11, United States Code Annotated, Section 96(b). In 1950, said code section was amended and the provisions giving concurrent jurisdiction to State Courts with "any court of bankruptcy" was removed therefrom. At said time, such provision was added to *Section 67 of the Bankruptcy Act*, which was codified as *11 United States Code Annotated, Section 107, subparagraph "(e),"* of which provides, as follows:

"For the purpose of any recovery or avoidance under this section, where plenary proceedings are necessary, any State court which would have had jurisdiction if bankruptcy had not intervened and any court of bankruptcy shall have concurrent jurisdiction."

The general provision as to the jurisdiction of the District Court is found in *11 United States Codes Annotated, Section 46, subparagraph "(a),"* which provides as follows:

"The United States district courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings under this title, between receivers and trustees as such and adverse claimants, concerning the property acquired or claimed

by the receivers or trustees, in the same manner and to the same extent as though such proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants."

The limitation requiring the consent of the defendant is inapplicable herein, since subparagraph "(b)" of said section excludes proceedings brought pursuant to Sections 96, 107 and 110 of Title 11. This includes the section and provision hereinbefore cited.

(c) *Jurisdiction of the Court of Appeal*: The jurisdiction of this Honorable Court to herein determine the within appeal, is predicated upon *28 United States Code Annotated, Section 1291*, which provides as follows:

"FINAL DECISIONS OF DISTRICT COURTS:

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

Section 1294 of said code, provides that venue is in this Honorable Court, providing:

"CIRCUITS IN WHICH DECISIONS REVIEWABLE:

Appeals from reviewable decisions of the district and territorial courts shall be taken to the courts of appeal as follows:

(1) From a district court of the United States to the court of appeals for the circuit embracing the district; . . ."

Statement of Case and Issues.

(a) *In the District Court:* Predicated upon the issues raised by the pleadings hereinbefore set forth, trial was had in the United States District Court, Southern District of California, before the Honorable Leon R. Yankwich, Judge presiding, commencing on Tuesday, the 17th day of May, 1955. All the evidence adduced at such trial was heard on said date and the matter was continued to Wednesday, the 18th day of May, 1955, for argument. At the conclusion of the argument, the Honorable Trial Judge indicated his holding and the reasons therefore. Since said reasons and the logic behind the same are considered in the "Argument" hereinafter contained, the same will not be repeated at this time.

Predicated upon the aforesaid reasons, the court made, signed and executed its "Findings of Fact and Conclusions of Law" on the 31st day of May, 1955 [p. 9, line 2]. Therein, the court found the fact of the adjudication in bankruptcy and the appointment of appellee as the duly appointed, qualified and acting Trustee [p. 9, line 23]. That on the 19th day of February, 1953, the bankrupt was indebted to appellant "for subdivision improvements previously installed on real property belonging to the bankrupt" [p. 10, line 15]. That on February 19, 1953, the appellant was indebted to the bankrupt "in a sum in excess of \$33,000.00 . . . secured by two second deeds of trust, the (appellant) had purchased from the bankrupt" [p. 10, line 22]. That such indebtedness and security had been assigned to "one H. B. Benner to secure the payment by the bankrupt of an obligation in the sum of \$6,000.00 owing from the bankrupt to said Benner" [p. 11, line 4]. That "on the 19th day of Febraury, 1953, the bankrupt's

remaining equity in said \$33,000.00 note was in the sum of \$9,500.00" [p. 11, line 11]. That on said 19th day of February, 1953, the bankrupt assigned his remaining equity and interest in said note and security to appellant "in full payment of the bankrupt's aforesaid antecedent indebtedness to the appellant in the sum of \$9,500.00" [p. 11, line 17]. That on said date the bankrupt was insolvent, appellant had reasonable cause to so believe and that said transfer enabled appellant to obtain a greater percentage of his indebtedness than other creditors of the same class [p. 11, line 23]. The court also found that the allegations of appellant's two affirmative defenses are not true [p. 12, line 14], and an "omnibus" Finding "that all the controverted allegations of plaintiff's complaint and the defendant's answer inconsistent with the foregoing Finding of Fact, are hereby found to be untrue" [p. 12, line 20].

The court concluded that the appellant "was an unsecured creditor who obtained a voidable preference under *Section 60 of the Bankruptcy Act* [p. 12, line 25], and that appellee was entitled to recover from appellant said sum of \$9,500.00, together with interest at the rate of 7% from the date of the filing of the action" [p. 13, line 5].

Interest as provided for in said judgment was computed in the sum of \$183.40 [p. 14, line 17], and judgment was entered for said sums and taxable costs in the sum of \$18.50 [p. 15, line 3]. Said judgment was entered on the 31st day of May, 1955 [p. 15, line 15], and on the 6th day of June, 1955, appellant herein filed his notice of appeal [p. 16, line 2]. Thereafter, and within the time required by law, appellant filed his "Designation of Contents of Record on Appeal" [p. 18, line 2].

(b) *In the Court of Appeal:* The records of this Honorable Court, of which judicial notice is taken, indicates the petitions of appellant and orders of this court authorizing the presentation of the appeal herein upon a typewritten transcript and the extension of time for the necessary preparation thereof.

The final portion and part of such typewritten record was filed with the Clerk of this Honorable Court on the 12th day of October, 1955, and this within brief was prepared and filed within the time provided by Rule 18 of the Rules of this Honorable Court.

(c) *Statement of Issues:* The legal problems herein involved, concern both facts and law. All of the problems thus presented, basically concern the primary issue. Did the appellant obtain a bankruptcy preference?

The appellant contends that he did not obtain a bankruptcy preference for two reasons, both of which present the specific issues upon which the "Argument" hereof is predicated.

First: *Does the transfer of property, the ownership of which is not in the bankrupt, constitute a preference?*, and

Second: *Does payment of a mechanic lienable claim, constitute a bankruptcy preference?*

The first issue thus presented, concerns itself primarily with the unique factual situation herein, which, as indicated in the "Statement of Facts" hereinafter contained, resulted in a third party actually compensating appellant from property actually in the name of such third party for services performed by appellant on behalf of the bankrupt.

The second matter and the more germane and basic issue, pertains to appellant, a general contractor, having performed services for which he was entitled to a lien upon the property of the bankrupt, who is compensated within the period wherein such lien is existing and may be asserted, who thereby, and in reliance upon such compensation, does not file such lien, is the forbearance in regard to said lien, and the non-assertion of the same, a present consideration, precluding the aforesaid credit and payment, from being a bankruptcy preference?

The balance of the within brief concerns itself with these two issues, which are presented by the consideration of the facts herein, and the law which appellant contends, is applicable thereto.

Specification of Error.

Pursuant to Rule 18, Section 2(d), appellant specifies as an error, the Finding of the court, hereinafter set forth, appellant asserting the same is erroneous, and not supported by substantial evidence.

(1) The court found:

“That on the 19th day of February, 1953, the bankrupt assigned and transferred all of his remaining equity and interest in said \$33,000.00 note, to-wit, \$9,500.00, in full payment of the bankrupt’s aforesaid antecedent indebtedness to the defendant in the sum of \$9,500.00.” [Finding VII, Tr. of Rec., Vol. I, p. 11, line 17.]

Such Finding is inconsistent with the evidence adduced at the trial, which was to the sole effect that the assignment of the credit, which was the basis for the claim and finding of the bankruptcy preference, consisted of the as-

signment by one H. B. Benner to the appellant of a credit upon a deed of trust given by appellant to the bankrupt. This credit was pursuant to instructions written by H. B. Benner, to whom the bankrupt, as beneficiary, had assigned the beneficial interest in said deed of trust [Pltf. Ex. 3]. The actual credit was the result of said instrument executed by said H. B. Benner and directed to the trustee named in the deeds of trust, and not the letter concurrently written by the bankrupt to the appellant informing him of the said credit allowed by said H. B. Benner, as the assignee of the beneficial interest in the deeds of trust [Pltf. Ex. 3].

This specification of error is made by reason of the fact that in the Argument, Point I, reference will be made to the fact that said H. B. Benner received an absolute and unfettered assignment [Def't. Ex. E], which, by its terminology, conveyed to him unconditionally, the beneficial interest in the deeds of trust. An innocent third party purchasing the same for value, would have acquired the entire interest of the beneficiary as against the equitable claims of the bankrupt. The rights of the bankrupt, subsequent to such assignment in said deeds of trust, were equitable and not legal. The legal credit given to the appellant was by said H. B. Benner, who, on said 19th day of February, 1953, "assigned and transferred said credit," to the appellant, the amount of the deeds of trust that were equal to the remaining equity of the bankrupt therein.

H. B. Benner and not the bankrupt, was the assignor and transferor. The rights assigned and transferred by him were at said time, his said legal property, although the amount thereof was equal to the equitable rights of the bankrupt therein.

Statement of Facts.

Moses A. Fleming, the bankrupt, is an attorney at law [Rep. Tr. p. 102, line 14].¹ Appellee, Ernest R. Utley is the duly appointed, qualified and acting Trustee in Bankruptcy. Appellant Ben Greenblatt is a licensed general contractor under the laws of the State of California [Rep. Tr. p. 67, line 20, to p. 68, line 2].

Said bankrupt, in addition to some four hundred acres of land, owned by him in Riverside County, owned certain property in Los Angeles County, including approximately twenty acres near the City of Baldwin Park [Rep. Tr. p. 6, line 7; p. 18, line 21].

Approximately May 28, 1952, or shortly prior thereto, said bankrupt and appellant discussed the sale of approximately eighteen of said acres, it being appellant's purpose at said time, to subdivide said land so purchased, improve the same with houses, and sell the same to the public. The sale thereof was consummated through an escrow dated May 28, 1952, held by the Escrow Guarantee Company [Rep. Tr. p. 7, line 11; Pltf. Ex. "1"]. During the negotiations of said sale, the bankrupt requested appellant to arrange to have the necessary improvements, such as streets, curbs and utilities, installed upon the lands retained by the bankrupt, at the same time appellant did the same, the bankrupt stating that the doing of the same would be advantageous to him, both as to the doing of the work and the costs therefor [Rep. Tr. p. 64, line 16]. The appellant indicated that he would be agreeable to so doing, provided he was credited with his costs upon the contemplated encumbrances that would con-

¹All citations contained in this subject matter, refer to Volume II (Reporter's) Transcript of Proceedings.

stitute part of the purchase price [Rep. Tr. p. 64, line 23]. The agreement of sale as set forth in the escrow instructions, provided for a total consideration to be paid by appellant of \$3,000.00 cash and \$36,000.00 payable at the rate of \$500.00 for each lot as the same and the house thereon, were sold [Rep. Tr. p. 8, line 3; Pltf. Ex. "1"]. This sum was to be evidenced by two notes and secured by two deeds of trust [Deft. Exs. "D" and "H"]. Such escrow instructions also provided:

“ ‘Seller agrees to give credit on such hereinbefore mentioned Deed of Trust, upon completion of work on the improvements upon the tract mentioned herein, for the following improvements which will be completed by buyer, paid for by buyer, for account of the seller and you will not be further concerned therewith. Utilities and improvement of La Sena Avenue from Olive Street to the north line of the alley. Utilities and improvement of the west one-half of La Sena Avenue to the South line of Lot 18. Improve alley running from La Sena Avenue to Azusa Canyon Road. Utilities and improvement of Nubia Street within the lines of this tract.’ ”

The approximate two acres retained by the bankrupt is indicated upon Defendant's Exhibit "A" [Rep. Tr. p. 20, line 2].

At the request of the attorney for the appellant, the bankrupt indicated by "red" pencil on said Exhibit "A," the land retained by him [Rep. Tr. p. 21, line 4], which consists of two parcels of land thereon designated "A" and "B." Subsequently, the appellant indicated on said exhibit, an additional piece of property retained by the bankrupt and designated the same as "F" [Rep. Tr. p. 65, line 20].

The work contemplated and described in general, under the escrow instructions, was commenced in July, 1952 [Rep. Tr. p. 57, line 19], and was concluded approximately January 6, 1953 [Rep. Tr. p. 57, line 23; p. 76, line 16].

By December 12, the work had sufficiently progressed that appellant was able to have computed the costs thereof, chargeable to the bankrupt and sent him a bill therefore [Rep. Tr. p. 28, line 13; Deft. Ex. "B"]. These charges were prepared for the appellant by Tom Gramm, a licensed surveyor and engineer [Rep. Tr. p. 67, line 13]. The work thus done was indicated upon Defendant's Exhibit "A" as items "C," "D," and "E," and consisted of the installation of utilities, improvements and paving on La Sena Avenue, from Olive to the north line of the alley, the west of La Sena Avenue to the south line of Lot 18, and of Nubia Street, within the lines of the tract, and also the paving of the alley running from La Sena Avenue to Azusa Canyon Road [Rep. Tr. p. 26, lines 20, 24]. Where utilities were placed as indicated in said Defendant's Exhibit "A," appellant caused the same to be put in and paid therefore [Rep. Tr. p. 27, line 6].

The bankrupt was dissatisfied with the amount of the charges and said he was going to look into the reasonableness thereof [Rep. Tr. p. 10, line 23]. Originally, as provided for in the written escrow instructions, the appellant desired a credit on the amount of his billing of approximately \$8,200.00 [Rep. Tr. p. 29, line 1]. Appellant contends that the bankrupt agreed to the giving of such credit [Rep. Tr. p. 68, line 22], which discussion

occurred when appellant delivered to the bankrupt Defendant's Exhibit "B" [Rep. Tr. p. 68, line 11], on December 12, 1952 [Rep. Tr. p. 70, line 3].

The appellant had theretofore learned that the bankrupt had assigned the two promissory notes and deeds of trust to one H. B. Benner [Exs. "E" and "H"]. Such assignment was made to secure to Mr. Benner, the payment of \$6,000.00 for certain property sold by him to the bankrupt at the time of the assignment. During the discussion of December 12, 1952, appellant requested the bankrupt to notify Mr. Benner to give appellant credit for the claim then made upon said promissory notes [Rep. Tr. p. 68, line 22]. The bankrupt contended that thereafter, several discussions were had as to the reasonableness of appellant's charges [Rep. Tr. p. 11, line 7], and also the bankrupt had noted that certain of appellant's houses were finished and occupied, and requested that he be paid the sum of \$500.00 for each house [Rep. Tr. p. 14, line 22].

It is apparent that some conflict existed between the appellant and bankrupt. Such dispute existed upon the claims of the bankrupt against the appellant for \$500.00 on each house allegedly sold. Factually, no house was sold since, prior to February 19, 1953, the escrow for such sales could not be closed for lack of partial reconveyance [Rep. Tr. p. 94, line 21], and the reconveyances could not be obtained until after the recordation of the deeds of trusts and assignments [Rep. Tr. p. 96, line 8]. None of the escrows remained unclosed due to the instructions of the appellant [Rep. Tr. p. 97, line 7].

During the first part of December, 1952, appellant purchased from the bankrupt, the four lots that are designated "A" of Defendant's Exhibit "A" [Rep. Tr. p. 21, line 24; p. 70, line 13; Deft. Ex. "A"]. Shortly thereafter, he was notified by the lending institution handling the matter, that there was a lien on the land held by a Mr. Velez. Inquiry disclosed that the bankrupt was indebted to Mr. Velez in the sum of \$1,300.00 [Rep. Tr. p. 91, line 12]. On December 30, 1952, appellant and the bankrupt met in the office of Burke Mathes, Esq. [Rep. Tr. p. 71, line 15], at which time, for the purpose of clearing said lien and obtaining good title to said four lots, appellant executed his check in the sum of the indebtedness [Deft. Ex. "C"], which was delivered to the bankrupt upon the expressed agreement that the same would be credited upon the notes and deeds of trust [Rep. Tr. p. 72, line 15]. A collateral instrument executed at the same time indicates this transaction occurred about December 30, 1952 [Deft. Ex. "I"]. A few days later, appellant sought to obtain a verification of the two credits to which he was entitled [Rep. Tr. p. 74, line 12]. When he failed to obtain the same and concurrently with the conclusion of the improvement work on the tract on January 6, 1953, appellant wrote a letter to Mr. Benner requesting all matters be held in abeyance until the credits which he sought, were given to him [Deft. Ex. "F"]. Thereafter, the bankrupt informed appellant that Mr. Benner was agreeable to the credits being allowed appellant, providing an itemization of his charges be given. There-

upon, the appellant wrote to Mr. Benner and annexed thereto, such itemization [Deft. Ex. "G"].

The relationship between the parties appears to have become strained about the period of the second purchase in December, 1952, by the appellant. The bankrupt as an attorney, knew that the appellant as a general contractor, had a right of lien [Rep. Tr. p. 40, line 17]. A few days after he mailed the letter to Mr. Benner, on January 6, 1953, appellant went to Mr. Benner's home and indicated he would file a Mechanic's Lien upon the Fleming property if he did not get the credit he claims he was entitled to [Rep. Tr. p. 75, line 10]. He had informed Mr. Fleming of his right of lien during the month of December, 1952 [Rep. Tr. p. 75, line 21]. The bankrupt did not have a definite recollection, but conceded that the appellant "may have said" that he would file a Mechanic's Lien on the bankrupt's property [Rep. Tr. p. 36, line 1]. On January 12, 1953, the appellant obtained written releases from the materialmen who furnished the asphalt, sand and gravel, used in the improvement of the bankrupt's property [Rep. Tr. p. 76, line 18; Deft. Ex. "J"]. He showed the same to the bankrupt [Rep. Tr. p. 77, line 11], at which time he specifically stated that he was going to prepare and file a Mechanic's Lien on the bankrupt's property [Rep. Tr. p. 77, line 22]. He continued expressing his intention to do so [Rep. Tr. p. 78, line 24], until his demands were acquiesced in on February 19, 1953.

On February 19, 1953, the appellant, the bankrupt and Mr. Benner met in the office of Mr. Gary of the escrow Guarantee Company, the trustee in the Deeds of Trust, and the escrow holder, at which time there was reduced to writing, the agreement to credit the appellant with \$9,500.00 on the deeds of trust [Pltf. Exs. "2" and "3"]. This is the approximate aggregate of of the two claims of appellant of \$8,200.00 for the improvement work and utilities done upon the bankrupt's property and the \$1,300.00 paid to release from the Velez lien, the portion of the property, sold by the bankrupt to appellant in December, 1952. The appellant has received no other compensation for the utilities and improvement work done by him, nor has he been repaid in any manner for the monies advanced for the payment of the Velez note and lien [Rep. Tr. p. 80, line 2].

The aforesaid credit of \$9,500.00 is the basis upon which the "complaint (herein) to recover (a) voidable preference under the provisions of Bankruptcy, Section 60 N," is predicated [Tr. of Rec., Vol. I, pp. 2-4, incl.]. As alleged in said complaint, an involuntary petition in bankruptcy was filed against said Moses A. Fleming on the 28th day of May, 1953, and a consent to adjudication was filed by him on the 29th day of May, 1953.

ARGUMENT.

I.

That the Transfer of Property, the Ownership of Which Is Not in the Bankrupt, Does Not Constitute a Bankruptcy Preference.

As alleged in the complaint, the complained of bankruptcy preference, consisted of credits allowed appellant on the 19th day of February, 1953, upon deeds of trust [Tr. of Rec., Vol. I, p. 3, line 14].

The Findings of the District Court specifically indicate that said deeds of trust had theretofore been assigned to "one H. B. Benner to secure the payment of an obligation of \$6,000.00 owing from the bankrupt to said Benner" [Tr. of Rec., Vol. I, p. 11, line 4]. On said February 19, 1953, the residual equity of the bankrupt in said deeds of trust was \$9,500.00 [Tr. of Rec., Vol. I, p. 11, line 11]. The District Court found that on said date "the bankrupt assigned and transferred all of his remaining equity and interest . . . in full payment of the bankrupt's aforesaid antecedent indebtedness to the defendant in the sum of \$9,500.00" [Tr. of Rec., Vol. I, p. 11, line 17]. It has been hereinbefore indicated, in the Specifications of Error, that said Finding is inconsistent and incompatible with the evidence adduced at the trial. On said 19th day of February, 1953, the bankrupt wrote to the appellant, a letter introduced into evidence, and on said date, said H. B. Benner, in writing instructed the trustee named in the deeds of trust, such instruction providing for a credit being allowed thereon, in favor of the

appellant [Pltf. Exs. "2" and "3"]. While the letter indicates the benefit received by the bankrupt, namely, the "full payment . . . of (appellant's) bill for all paving authorized and due to (appellant and) reimburse (appellant) for \$1,300.00 (appellant) advanced to pay off the Velez claim" against the bankrupt, the actual credit received by the appellant therefore was a direct grant from said H. B. Benner in his letter of instruction to the Escrow Guarantee Company. At said time the assignment from the bankrupt to said H. B. Benner was a good and valid assignment, and the actual title to the deed of trust and to the beneficiaries' interest therein, was in said H. B. Benner.

It is respectfully submitted that to constitute a preference, the credit or payment must have been given by the bankrupt or his agent, and not by a third party, such as said H. B. Benner.

In the case of *Western Tie & Timber Company v. Brown* (1905), 196 U. S. 502, the bankrupt was indebted to a corporation whose laborers purchased supplies from him. Periodically he rendered to the corporation a statement of the amounts due from such laborers, which it deducted from their wages and remitted to him in an aggregate sum. During the period within four months prior to bankruptcy, such sum so collected from the laborers had not been remitted, and upon bankruptcy, the corporation credited the same upon monies due it from the bankrupt. The court concluded at page 510 of the decision, that no voidable preference was thereby created and reversed the holding of the District Court, predicated upon the assumption that the aforesaid transaction constituted a voidable preference.

Following said case and to the same effect is the case of *Rector v. City Deposit Bank* (1906), 200 U. S. 415, 419.

Predicated upon this general principal, there have been many cases, two of which arose in the Ninth Circuit, and therefore are specifically applicable.

In the case of *O. L. Shafter Estate Co. v. Mooney* (1927), 18 F. 2d 836, the defendant owned a number of ranches which it rented on an annual basis to dairymen, furnishing to the dairymen the necessary stock. The defendant also allowed such dairymen to sell with defendant's consent, the good will and privilege of renewing the leasehold. Within four months prior to bankruptcy, the bankrupt, one of the defendant's tenants, sought to sell his good will and leasehold rights, and the defendant required the payment of all delinquent rentals, as a condition to its consent. The purchaser made such payments to the defendant. This Honorable Court held at page 837:

"The truth is that, in accepting Hall as lessee and requiring him to buy the equipment from Bartholomew, defendant assisted Bartholomew in getting more for what he owned than would otherwise have been possible. True, it might have permitted him also to capitalize the so-called good will; but that would have been a matter of grace, and not of right. Even if we assume that, in exacting \$1,700 from Hall as a condition to giving him a lease, defendant acted harshly toward Hall, Bartholomew's creditors are not in position to complain, in the absence of proof that some part of that sum was for property owned by Bartholomew, or was in consideration for a right vested in him. To constitute a preference, the payment in question must have been out of funds belonging to the bankrupt, and have operated to diminish his estate."

In the case of *In re Zaferis Bros. & Co., Ltd.* (1933), 67 Fed. 140, and order of the Referee, predicated upon an alleged preference, was affirmed by the District Court. Such order was based upon the transaction, whereby a stockholder who had guaranteed the bankrupt's obligations to a bank, transferred credits to the bankrupt's account to reduce its overdraft and took the bankrupt's unsecured checks for the amounts so deposited. It was held that the same did not constitute a preference. This Honorable Court observed at page 141:

“It therefore lacked the primary element of a preference, that of a transfer of the bankrupt's property. *Newport Bank v. Herkimer Bank*, 225 U. S. 178, 32 S. Ct. 633, 56 L. Ed. 1042 (1912) . . .”

In each of the foregoing cases, the monies that were the subject of the transfer were legally the property of a third person, in which the bankrupt had an equitable right. The same situation is applicable herein to the beneficiary's interest under the deeds of trust. The form of assignment used for the conveyance thereof, was absolute in terminology [Deft. Ex. “E”]. But an equitable right remained in the bankrupt to the residue of the proceeds thereof, after Mr. Benner and the other parties entitled thereto, had been paid in full.

It is respectfully submitted that under the facts and law applicable thereto, the granting of said credit by H. B. Benner to the appellant, consisted of the transfer of property, the legal ownership of which was not in the bankrupt, and does not constitute a bankruptcy preference.

II.

That the Payment of a Mechanic Lienable Claim, Does Not Constitute a Preference.

The within point is more germane and more general in its application than the preceding point. It is predicated upon the assumption, without any concession, that the credit or payment, which is the basis of the alleged preference, was made from assets legally belonging to the bankrupt. Since it is less technical and more equitable in scope, than the preceding point of law, it is respectfully urged, in preference to, but without diminution of said preceding point of law.

The facts are without contradiction that the appellant, a general contractor, licensed as such by the State of California, performed or caused to be performed, mechanic lienable work, for and on behalf of the bankrupt. As indicated in the Statement of Facts, such work consisted of the paving and installation of utilities, either jointly or severally, upon property belonging to the bankrupt.

Section 1184.1 of the Code of Civil Procedure of the State of California provides:

“Improvement of lots or tracts of land:

“Any person who, at the instance or request of the owner (or any other person acting by his authority or under him, as contractor or otherwise) of any lot or tract of land, grades, fills in, or otherwise improves the same, or the street, highway, or sidewalk in front of or adjoining the same, or constructs or installs sewers or other public utilities therein, or constructs any areas, or vaults, or cellars, or rooms, under said sidewalks, or makes any improvements in connection therewith, has a lien upon said lot or

tract of land for his work done and materials furnished. (Added Stats. 1951, c. 1159, p. 2943, Section 1.)”

The work done upon the land of the bankrupt was part of general improvements on the entire tract, including the land sold by the bankrupt to the appellant, and those retained by the bankrupt, which work was completed during the first week of January, 1953. The time in which the appellant, as a general contractor and the original contractor herein, could file his lien, is governed by *Section 1193.1(c) of said Code of Civil Procedure*, which provides, as follows:

“Notice of completion; time for filing. The owner shall within 10 days after the completion of the work of improvement file for record a notice of completion as provided in subdivision (f) of this section. If such notice be so filed, then, except as to any persons who were required to file a claim of lien as provided in subdivision (b) of this section, every original contractor must within 60 days after the date of filing for record such notice, and every person, other than an original contractor, claiming the benefit of this chapter must within 30 days after the date of filing for record such notice, file for record his claim of lien. If such notice be not so filed, then, except as to any persons who were required to file for record claims of lien as provided in subdivision (b) of this section, all persons claiming the benefit of this chapter shall have 90 days after the completion of such work of improvement within which to file their claims of lien.”

The work of improving the tract as a whole, was completed on the 6th day of January, 1953 [Rep. Tr. p. 57,

line 23; p. 76, line 16]. Sixty days thereafter would have elapsed on the 8th day of March, 1953. The lien of the appellant could therefore have been asserted on the 19th day of February, 1953, when the alleged preference was allowed to him by a credit upon the deed of trust then owned by Mr. H. B. Benner.

On the 19th day of February, 1953, the lien of the appellant for the improvements placed by him upon the land of the bankrupt, consisting of pavement and public utilities, were still lienable for a reason other than the period of time. Such work is lienable under *Section 1184.1 of the Code of Civil Procedure, supra*, and pertaining to improvements requiring acceptance by governmental authorities, the lien for the work done in regard thereto, and the time in which the same could be filed, is further governed by *Section 1193.1(e)* of said *Code of Civil Procedure*, providing as follows:

“Public governmental work; acceptance. If a work of improvement is of the character referred to in Section 1184.1 of this code and is subject to acceptance by any public or governmental authority, the completion of such work of improvement shall be deemed to be the date of such acceptance.”

The germane question thus presented, is, since the appellant, on February 19, 1953, was entitled to assert and could have legally asserted a mechanic's lien upon the real property of the bankrupt, did his acceptance of the credit in satisfaction of his lienable claim, constitute a preference? It is respectfully submitted that the same did not.

In the case of *San Mateo Feed & Fuel Co. v. Hayward* (1945), 149 F. 2d 875, Mr. Justice Denman (now Chief and Senior Judge of our Ninth Circuit), set forth the contentions of the defendant therein, at page 876, as follows:

“As we understand appellants’ contentions they are, in effect, (a) That since the materialmen’s lien disappeared to the extent the debt for the materials was lessened by the payments, there was a detriment to the materialmen which constituted a present consideration for the delivery of the checks; and (b) the checks were in fact paid under an agreement made long before the four months’ period between the materialmen, the owner, and the contractor, by which the contractor agreed that the owner should pay the materialmen for the materials delivered to the building out of the amounts due from the owner to the contractor when they became due, and hence the delivery of the checks was a transaction between the owner and the materialmen in discharge of an obligation of the former to the latter.”

In regard to said contentions, the court held immediately thereafter:

“(a) With regard to the first contention, the lien extinguished was not upon the property of the bankrupt and hence its extinction caused no increase in the bankrupt’s estate . . . (b) With regard to the claimed prior agreement that the checks were delivered in payment of a direct obligation of the owner to the materialmen, assuming that such a payment would not be a preference, the evidence does not show such an agreement was made . . .”

Although, factually contrary to the cause herein, the law thus established is specifically applicable, since: (a) The property involved herein is the property of the bankrupt, and hence, the extinction of the inchoate lien caused

an increase in the bankrupt's estate, and (b) The prior agreement as to the allocation, purpose and objective of the credit, is expressly set forth in the written escrow instructions of May 28, 1952, signed by the parties and constituting an agreement between them to the effect that Bankrupt as seller [Pltf. Ex. "1"], agrees to give defendant as contractor, a credit upon the deed of trust therein described for the improvement of the real property thereafter remaining in the name of such seller.

The rule inferred in the foregoing case and contended for herein by the appellant, namely, the payment of an enforceable, although inchoate lien within the four months' period, does not constitute a preference, has been adhered to by the Honorable Court of Appeals of the Ninth Circuit.

In the case of *Jackson v. Flohr* (W. D. Wash. N. D., 1954), 119 Fed. Supp. 305, the court reviews several cases dealing with mechanic's liens, including the case of *San Mateo Feed & Fuel Co. v. Hayward*, *supra*, and cites with approval the case of *Seattle Association of Credit Men v. Daniels* (1942), 15 Wash. 2d 393, 130 P. 2d 892, at page 308 of the District Court's Opinion, as follows:

" 'If respondents (construction contractors supplying work and materials) had an enforceable lien, even though inchoate, for the work performed and materials furnished, the payment (within the four-month period) was not a preference.' (15 Wash. 393, 130 P. 2d 894.)"

To the same effect is 4A *Remington on Bankruptcy* 112, Section 1664, particularly the current supplement thereto, page 22.

Also adhering to said principle is the case of *In re Lynn Company Coal Co.* (1908), 168 Fed. 998, 999.

The general rule that the payment of an enforceable statutory lien does not constitute a bankruptcy preference, is set forth in 8 *Corpus Juris Secundum* 781, Bankruptcy, Section 220(e), wherein it is set forth

“In view of the general rule that depletion or diminution of the estate available for creditors is an essential element of a preference (see *supra*, Section 220a), no preference results, where there is not a diminution of the assets available for general creditors, from the enforcement of a valid, existing lien, from a payment to discharge a valid lien, . . .”

Numerous cases are cited in support thereof, and in the prior note upon said subject matter, found in 7 *Corpus Juris* 164, note 65. The cases thus cited, include several pertaining to Mechanic's Liens (*Public National Bank & Trust Co. v. Fortinberry* (Tex. Civ. App.), 53 S. W. 2d 113, and *Russell v. Mayfield Lumber Co.*, 158 Ky. 219, 164 S. W. 783). The acceptance by the Federal courts of this rule is indicated by many cases.

In the case of *Root Mfg. Co. v. Johnson* (1914), 219 Fed. 397, the waiver of a Materialmen's Lien was held to preclude the transaction from being a preference, the court holding at page 401:

“. . . it is unquestionable that the statute does not denounce as preferential all payments so obtained by a creditor within the four-months period; that payment may lawfully be accepted for discharge of a valid lien, either legal or equitable; that payments or benefits obtained in various other transactions, as exemplified in recent decisions (*Western Tie & Lumber Co. v. Brown*, 196 U. S. 502, 25 Sup. Ct. 339, 49 L. Ed. 571; *Newport Bank v. Herkimer Bank*, 225 U. S. 178, 32 Sup. Ct. 633, 56 L. Ed. 1042; *Continental*

Trust Co. v. Chicago T. & T. Co., 229 U. S. 435, 33 Sup. Ct. 829, 57 L. Ed. 1268), . . .”

This decision was approved on appeal to the United States Supreme Court, in the case of *Johnson, Trustee etc. v. Root Mfg. Co.* (1916), 241 U. S. 160.

In the case of *Bachner v. Robinson* (1939), 107 F. 2d 513, the creditor had a lien upon the balance of the leasehold of the bankrupt for unpaid rent. In holding that a payment made in satisfaction of such lien and to transfer such leasehold did not constitute a preference, the court held at page 515:

“ . . . In reality, therefore, the lessor held a position analogous to that of a secured creditor; it is much as though there had been a mortgage on the leasehold which the purchaser insisted should be paid before he would take title. The payment of a secured claim is not a preference. *Johnson v. Root Mfg. Co.*, 241 U. S. 160, 36 S. Ct. 520, 60 L. Ed. 934; *Irving Trust Co. v. Bank of America Nat. Ass’n*, 2 Cir., 68 F. 2d 887, certiorari denied, 292 U. S. 628, 54 S. Ct. 630, 78 L. Ed. 1482 . . .”

To the same effect is the recent case of *Gibson v. Central National Bank of McKinney* (1948), 171 F. 2d 398, 400.

Other decisions holding that the payment of a mechanic lienable claim does not constitute a bankruptcy preference, are *In re Conrad* (Kan., 1934), 26 A. B. R. (N S), 600; *Vanderlip v. Walker* (1932), 144 Misc. 629, 259 N. Y. Supp. 289; 21 A. B. R. (N. S.) 638; and *Public National Bank & Trust Co. v. Fortinberry* (1932), 53 S. W. 2d 113, 26 A. B. R. (N. S.) 246.

The basic contention of appellant in this appeal is that on February 19, 1953.

- (a) Appellant Had a Good, Valid and Existing Mechanic's Lien, Recognized by the Constitution and Statutes of the State of California, for the Work, Services and Labor Performed by Appellant Upon and for the Benefit of the Bankrupt's Land.

The constitution, statutes and decisions of the appellate courts of the State of California, particularly that of the Supreme Court of said state, recognize such principle.

In the case of *English v. Olympic Auditorium, Inc.* (1933), 217 Cal. 631 (20 P. 2d 946, 87 A. L. R. 1281), in discussing the nature and effective date of a mechanic's lien in the State of California, the Supreme Court of said state, held at page 638:

“ ‘The Constitution of the state of California (Art. XX, sec. 15), is the basis of the Mechanics' Lien Law, and is as follows: ‘Mechanics, materialmen, artisans, and laborers of every class shall have a lien upon the property upon which they have bestowed labor or furnished material, for the value of such labor done and material furnished; and the legislature shall provide, by law, for the speedy and efficient enforcement of such liens.’ The language of the foregoing provision of our Constitution is clear and positive and gives a direct lien on the property upon which the classes named therein have bestowed labor or furnished material to the extent of the value thereof. In carrying out the above constitutional mandate, the legislature has provided by section 1183 of the Code of Civil Procedure that mechanics and materialmen shall have a lien upon the property on which they have bestowed labor and material, thus following the constitutional provision . . .

“*Mazzera v. Ramsey*, 72 Cal. App. 601 at page 606 (238 Pac. 101, 103), quotes with approval from *Peo-*

ple v. Moxley, 17 Cal. App. 466, 468 (120 Pac. 43), as follows: *'The lien of a mechanic or material-man is a constitutional right and attaches to the structure as the material is furnished or labor performed. The statutory procedure enacted for the enforcement of such right has reference only to the remedy.'* (See, also, Siegel v. Hechler, 181 Cal. 187 (183 Pac. 664).)" (Emphasis ours.)

Pursuant to said decision, the mechanics' lien of the appellant, under the Constitution and statutes of said state, attached to the property of the bankrupt in July, 1952 [Rep. Tr. p. 57, line 19], when the improvement work was commenced.

(b) That the Appellant Had the Right to Perfect Said Lien.

As hereinbefore indicated, under the statutes of the State of California, appellant's right to perfect said lien had not expired on said 19th day of February, 1953, under any statutory theory. The same was for public improvements and utilities requiring acceptance by governmental authorities and also the requisite ninety-day period consisting of a cessation of labor for thirty days and a statutory period of sixty days in which a contractor could enforce his claim, had not expired. Factually, the said sixty-day period had not expired from the conclusion of the making of the improvements during the first week of January, 1953.

(c) That Concurrently With the Receipt of the Credit or Payment, the Appellant Satisfied and Forewent His Said Statutory Lien.

If payment had not been made, there appears no question that the appellant would have asserted his lien. He had a legal right so to do, and indicated his intention to

do so [Rep. Tr. p. 75, lines 10, 21; p. 77, line 22, to p. 78, line 24]. The bankrupt, an attorney, knew of such right of lien [Rep. Tr. p. 40, line 17], and concedes that the appellant "may have said" that he would file such lien [Rep. Tr. p. 31, line 1]. Appellant, in substance, released said lien as one of the considerations for the credit or payment received by him, since the lien could no longer be asserted after payment had been received or the obligation had been satisfied. The fact that the satisfaction of said lien was material, is indicated by the releases obtained from the materialmen [Rep. Tr. p. 76, line 18; Deft. Ex. J].

(d) By Reason of the Release of the Bankrupt's Land From the Mechanic's Lien That Could Have Been Asserted by the Appellant, There Was No Bankruptcy Preference Herein.

Had the mechanic's lien of the appellant been perfected by reason of non-payment, such Constitutional and statutory lien would have been a preferred claim or charge upon the property of the bankrupt, that would have resulted in the diminution of his estate, in regard to unsecured creditors. By reason of the factual situation herein, such estate was not diminished by the credit or payment to the appellant. Factually, appellant as a "secured" creditor, gave up a security equal to the amount of the credit or payment received by him, which resulted in the transaction herein, not effecting the amount of the estate of the bankrupt, particularly that portion thereof that was eventually distributed to unsecured creditors. This is the basic reasoning for the holdings of the various Federal cases hereinbefore cited.

It is respectfully submitted that when the mechanic lienable claim of the appellant was satisfied by the credit

or payment of February 19, 1953, and by reason thereof, said lienable claim was not thereafter pursued and asserted. Such credit and payment did not constitute a preference.

Conclusion.

It is respectfully submitted that under the facts and law applicable thereto:

(a) The credit given by Mr. Benner was the allowance of a credit by a third person and not involving the property of the bankrupt and hence, could not constitute a bankruptcy preference, or

(b) The appellant having a mechanic lienable claim recognized by the Constitution, statutes and decisions of the State of California, and such claim being a valid lien upon the property of the bankrupt which could have been asserted and perfected on the day that the credit was allowed, the payment of such credit on said date, resulting in the extinction of such lien, was for a present consideration, did not result in the diminution of the estate of the bankrupt, and therefore could not constitute a bankruptcy preference.

For the foregoing reasons it is further respectfully submitted that the judgment of the District Court, holding and adjudicating that the appellant had received a bankruptcy preference, should be reversed, and the cause remanded for further proceedings in conformity with the law, hereinbefore contained.

Respectfully submitted by,

WOLVER & WOLVER,

By EUGENE L. WOLVER,

Attorneys for Appellant.

No. 14875

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GEN GREENBLATT,

Appellant,

vs.

ERNEST R. UTLEY, Trustee in Bankruptcy for MOSES A.
FLEMING, a bankrupt,

Appellee.

APPELLEE'S BRIEF.

BURKE MATHES,

453 South Spring Street,
Los Angeles 13, California,

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DEC 16 1955

PAUL P. O'BRIEN, CLERK

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IN THE

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GEN GREENBLATT,

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FLEMING, a bankrupt.

Appellee.

APPELLEE'S BRIEF.

Statement of Case and Issues.

In drafting his "Statement of Facts" the Appellant apparently forgot that the Trial Court found contrary to the affirmative allegations of his answer.

We believe, however, it would serve no useful purpose to point out each of the several errors since they will be apparent to this Honorable Court from the reading of the record.

The Appellant advanced two contentions or grounds for the reversal of the District Court. We shall answer these in the order in which they are presented in Appellant's Opening Brief.

ARGUMENT.

I.

The Transfer by the Bankrupt to the Appellant of His \$9,500.00 Interest in the Promissory Note Constituted a Bankruptcy Preference.

The uncontradicted evidence shows: That on and prior to February 19, 1953, the Appellant was indebted to the bankrupt in the sum of \$33,000.00; that this indebtedness was evidenced by a promissory note, secured by a deed of trust, payable to the order of the bankrupt. (App. Op. Br. p. 11.)

That the bankrupt had assigned said promissory note and the security therefor to one H. B. Benner to secure an indebtedness of the bankrupt to said H. B. Benner in the sum of \$6,000.00. [Findings, p. 10; App. Op. Br. p. 13.]

That thereafter and prior to February, 1953, the bankrupt had made further partial assignments of said promissory note and the security therefor to other creditors, with the knowledge and consent of the Appellant and Benner, so that on February 19, 1953, the bankrupt's remaining interest in the note and security was admittedly the sum of \$9,500.00. [Rep. Tr. p. 54, lines 7-17; p. 90, line 9, to p. 91, line 20.]

That on February 19, 1953, and within the period of four months next preceding the date of filing of the petition in bankruptcy, the bankrupt was indebted to the Appellant for the sum of \$8,200.00 on account of subdivision improvements installed on real property belonging

to the bankrupt, plus an additional \$1,300.00 or a total of \$9,500.00. [Tr. of Rec., Vol. 1, p. 6, lines 20-25.]

That on said day of February 19, 1953, while the bankrupt was so indebted to the Appellant for said sum of \$9,500.00 the bankrupt, at the Appellant's request, transferred to the Appellant the bankrupt's \$9,500.00 interest in the aforesaid note in full satisfaction and payment of said \$9,500.00 debt.

As the Court said in *D. L. Shafter Estate Co. v. Mooney* (1927), 19 F. 2d 836 at p. 837, relied upon by the Appellant and cited on page 19 of Appellant's Opening Brief:

"To constitute a preference, the payment in question must have been out of funds belonging to the bankrupt, and have operated to diminish his estate."

Here the bankrupt in question unquestionably owned a \$9,500.00 interest in said \$33,000.00 note and the security therefor. Everyone concerned, including the Appellant, admitted it. So that \$9,500.00 interest in the note and security on February 19, 1953, constituted a part of the bankrupt estate—"part of the funds belonging to the bankrupt."

Clearly, then, the bankrupt's pre-existing obligation to the Appellant was paid on that day to the Appellant by the bankrupt's agent, Benner, "out of funds belonging to the bankrupt."

II.

The Appellant's Contention That He Gave Up His Right to Assert a Valid Mechanic's Lien Is Without Foundation.

The Appellant introduces his "Mechanic's Lien" contention at the top of page 21 of his brief with the interesting statement that

"The within point is more germane and more general in its application than the preceding point. It is predicated upon the assumption, without any concession, that the credit or payment which is the basis of the alleged preference, was made from assets legally belonging to the bankrupt. Since it is less technical and more equitable in scope, than the preceding point of law, it is respectfully urged, in preference to, but without diminution of said preceding point of law."

The paragraph just quoted from the Appellant's brief is, we submit, in effect an admission that his Point I is devoid of merit. Of course we agree, and we submit further that the "Mechanic's Lien Point" (Point II) is equally without foundation.

The admitted facts are that prior to any improvements made by the Appellant on the bankrupt's real property and at all times thereafter until the transfer in question, the Appellant was indebted to the bankrupt at least to the extent of the bankrupt's conceded \$9,500.00 interest in the Appellant's \$33,000.00 note.

It is also admitted that the value of the improvements did not exceed \$8,200.00.

Section 1193(y) of the California Code of Civil Procedure relating to Mechanics' Liens provides that the lien can exist only in cases where there remains some balance unpaid, "after deducting all credits and offsets." It

requires no extended argument to point out that the obligation of \$8,200.00 in improvements for which the Appellant contends he was entitled, to claim a mechanic's lien did not exist after "deducting all just credits and offsets"—namely, the \$9,500.00 admittedly then owing by the Appellant to the bankrupt.

To state it another way, the Appellant could not have claimed a valid lien under the Mechanic's Lien law of California, simply because he never could have made oath that any balance remained due him for improvements, "after deducting all just claims and offsets," as required by Section 1193(y) of the California Code of Civil Procedure.

It might be added furthermore, that the evidence did not support the Appellant's claimed defense.

Conclusion.

The facts involved were largely undisputed. Where contradiction existed in the evidence, the District Court resolved the conflicts in favor of the Appellee. The Trial Judge's Findings when based on conflicting evidence, will not be disturbed by this Honorable Court except where found to be "clearly erroneous." The Findings of Fact are well supported by the evidence and the Conclusions of Law properly to be drawn therefrom called for the judgment hereunder rendered.

That Judgment should be approved.

Respectfully submitted,

BURKE MATHES,

Attorney for Appellee.

No. 14875

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BEN GREENBLATT,

Appellant,

vs.

ERNEST R. UTLEY, Trustee in Bankruptcy for MOSES A.
FLEMING, a Bankrupt,

Appellee.

APPELLANT'S REPLY BRIEF.

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DEC 31 1960

PAUL F. GRIEN, CLERK

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Appellee.

APPELLANT'S REPLY BRIEF.

Foreword.

Basically, the "Statement of Case and Issues" contained in Appellee's Brief, does not refute any of the preliminary contentions of Appellant's Opening Brief, including the "Statement of Pleadings and Fact as to Jurisdiction" (p. 1), "Statement of Case and Issues" (p. 5), "Specifications of Error" (p. 8), and "Statement of Facts" (p. 10).

ARGUMENT.

I.

The Transfer by the Bankrupt of His Possible Equitable Interest in the Promissory Note, Did Not Constitute a Bankruptcy Preference.

As indicated in Appellant's Opening Brief, the Bankrupt made an absolute and outright transfer of his beneficiary interest in the deeds of trust to H. B. Benner (p. 8). While the amount thus transferred, was potentially greater than the obligation to H. B. Benner, no reservation was therein contained, nor arrangements entered into, for the reversion of any possible balance remaining in favor of the beneficiary after the obligation to H. B. Benner had been fully paid. The rights of the bankrupt in said promissory note was therefore not legal, but equitable, and could only be enforced thereafter, as an equitable right.

In the cases cited under Point "I" of the Argument in Appellant's Opening Brief (p. 17), the bankrupt's estate in each instance, had an equitable right to the property, which, basically, was being held for the bankrupt under some form of trust or fiduciary relationship. All such cases held that the transfer of such equitable right for the benefit of the bankrupt, did not constitute a preference, since neither the property transferred, nor the title therein, was in the bankrupt.

It is respectfully submitted that the law therein enunciated, is particularly applicable hereto, since the bankrupt, after the absolute conveyance to H. B. Benner, could not have asserted title to the beneficiary interest conveyed to Mr. Benner, except after successfully prosecuted equitable litigation.

II.

That the Appellant, Factually, Gave Up His Right
to Assert a Valid Mechanic's Lien.

A legally sound argument may be predicated upon an established legal premise supported by recognized legal principles, and still the same may not have the same persuasive effect as an argument, also predicated upon legal precedent, but one wherein the factual basis indicates the justice which follows from adherence thereto. It was the intention, and it is respectfully submitted, that the same was concisely and succinctly stated in Appellant's Opening Brief (p. 21), that the second point of the Argument was propounded upon the aforesaid premise. It was therein set forth, and it is still the intention of the scrivener hereof, that said first point of law be urged with the same sincerity as the within point of law. Its legalistic basis was indicated, and the more general scope of the within point of law, was advocated, without diminution to the preceding point of law, since both of the same are predicated upon established legal principles.

Any contention that any statement constituted a waiver of Point "I" of Appellant's Opening Brief is herewith sincerely controverted and traversed.

Appellees contend that since at the time appellant rendered services for which he was entitled, under the laws of the State of California, to assert a mechanic's lien, he was indebted on a collateral matter to the bankrupt, such lien could not be asserted. No law is cited by appellee to support this contention, and after diligent search, no law in California was found that remotely suggested or indicates that a mechanic's lien is waived by reason of an independent collateral account between the parties.

Section 1193(j) (erroneously described in Appellee's Brief as Section 1193(y)) of the Code of Civil Procedure of the State of California, provides that a claimant must assert in his verified claim of lien, "a statement of his demand after deducting all just credits and offsets."

It is respectfully submitted that this refers to credits and offsets that pertain to the statement of the demand upon which the mechanic's lien is predicated. The law of the state of California has always adhered to credits and offsets predicated upon this premise.

The argument of the Appellee is factually without basis. The promissory note given by the appellant to the bankrupt dated May 28, 1952, in the sum of \$36,000.00 and bearing no interest, specifically provides that "principal (is) payable on or before June 1, 1953" [Tr. of Rec., Vol. II, p. 34, line 11; Deft. Ex. "D"]. While the appellant could have anticipated payment prior to June, 1953, the bankrupt could not have enforced payment prior to said date. Therefore, on February 19, 1953, the same could not have been asserted by the bankrupt as a credit or offset, since such obligation was not due or payable on said date.

The release clause contained in the deeds of trust were likewise non-enforceable, since no transfer of property was made by the appellant prior to February 19, 1953. The deeds of trust were not recorded until subsequent thereto [Tr. of Rec., Vol. II, p. 96, line 8]. No escrows were closed prior to said date, and therefore no conveyances were made [Tr. of Rec., Vol. II, p. 94, line 21], and the appellant was not responsible for the non-closing of any such escrows [Tr. of Rec., Vol. II, p. 97, line 7].

Had the promissory note or any part thereof been due or payable, and the offset been allowed on said date, in

satisfaction of the subsequent non-assertion of the mechanic's lien, as indicated in Appellant's Opening Brief, the same would not have constituted a preference (p. 21).

As hereinbefore indicated, the law of California, and basically the general principle of law, applicable to mechanic's liens, has afforded the claimant the right to assert his lien, but he is required to give a credit thereon of offsets and credits in diminution of the amount of such lien and attributable to the transaction that gave rise to such lien. Indicative of the circumstances in which offsets and credits have been allowed by the courts of the State of California, are the following cases:

In the case of *Clancy v. Plover* (1895), 107 Cal. 272, payments made by the owner to a subcontractor, together with costs and attorney's fees, were held to be a proper credit and set-off against the claim of mechanic's liens by the general contractor.

In the case of *Stimson v. Dunham* (1905), 146 Cal. 281, claims of laborers and materialmen were held at page 284, to be a sufficient credit and offset against the general contractor, that where the amount thereof exceeded his claim, he was without the right to assert a mechanic's lien.

In the case of *Wyman v. Hooker* (1905), 2 Cal. App. 36, liens of materialmen paid by the owner, together with attorney's fees and expenses connected therewith, were held at page 40, to constitute a proper credit and offset.

In the case of *Combs v. Eberhard* (1932), 120 Cal. App. 25, the amount of a lien for lumber was held at page 28, to be a proper offset and credit against the general contractor.

Likewise indicating that credits and offsets must be germane to the transaction in which the claim of me-

chanic's lien is asserted, are the general authorities of 57 C. J. S. 677; *Mechanic's Liens*, Section 154; and 36 *Am. Jur.* 103; *Mechanic's Liens*, Section 150.

The basic logic behind this rule is that the contractor is morally obligated to prevent liens or claims being filed by subcontractors, laborers or materialmen against the owner of the property upon which the work is done and the mechanic's lien may be asserted, and he is therefore legally bound to credit such owner with any lien or the costs of any lien asserted by any such subcontractor, laborer or materialman. The rationale beyond this rule is set forth in the case of *Stone v. Serimian* (1926), 198 Cal. 520, wherein the respondent asserted a mechanic's lien for the construction of a theatre building, and the appellant interposed a counterclaim for labor and materials furnished by him by reason of the failure of the respondent to do so. The counterclaim was disallowed by the court as a credit. In reversing said judgment, the appellate court held at page 523:

"It was the duty of respondent to protect the appellants' property against any lien preferred by the lumber company. The owners are entitled to set off against their obligation to pay plaintiff so much as the labor he performed and the materials he furnished are reasonably worth the counter-obligation of plaintiff to indemnify them for any amount they have been compelled to pay to relieve their property from liens filed thereon to secure plaintiff's debts, including the attorney's fees and costs in the suits to enforce the liens. (Code Civ. Proc., sec. 1193; *Clancy v. Plover*, 107 Cal. 272, 275 (40 Pac. 394); *Covell v. Washburn*, 91 Cal. 560, 563 (27 Pac. 859); see, also, *Holden v. Mensinger*, 175 Cal. 300, 305 (165 Pac. 950).)"

It is respectfully submitted that the promissory note given by the appellant to the bankrupt was not payable, and could not, in any proceeding or negotiation, be asserted as a credit or offset; that if payable, the same was not of a nature of the obligations referred to or intended by the statute as a "credit or offset," since it was collateral in its inception, and did not arise from the subject matter upon which the mechanics lien was being asserted.

It is further respectfully submitted, that as indicated in Appellant's Opening Brief, a credit allowed upon the promissory note in consideration of the non-assertion and waiver of the right to assert his mechanic's lien by the appellant, constituted a present consideration, which did not result in the diminution of the bankrupt's estate and did not constitute a bankruptcy preference.

Conclusion.

It is respectfully submitted that the contentions contained in Appellant's Opening Brief, are not refuted in the Appellee's Brief, that the transfer of property, the legal ownership (as distinguished from equitable right) of which is not in the bankrupt, does not constitute a bankruptcy preference, and that the payment of the mechanic's lienable claim, does not constitute a preference. That each and both of said situations existed herein, and that by reason thereof, the judgment of the trial court should be reversed, and the cause remanded for further proceedings, in conformity with the law contained in the Appellant's Opening Brief and herein.

Respectfully submitted,

WOLVER & WOLVER,

By EUGENE L. WOLVER,

Attorneys for Appellant.



No. 14877

United States
Court of Appeals
for the Ninth Circuit

HAROLD D. PADDOCK, Appellant,

vs.

FLORENCE PADDOCK, Appellee.

Transcript of Record

Appeal from the District Court for the District of Alaska,
Third Division

FILED

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PAUL P. O'BRIEN, CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court for the Territory of Alaska,
Third Division

No. A-8926

FLORENCE PADDOCK, Plaintiff,

vs.

HAROLD D. PADDOCK, Defendant.

COMPLAINT

Comes now the above named plaintiff, and for her cause of action against the defendant above named, complains and alleges as follows:

I.

That plaintiff is now and for more than two years immediately preceding the commencement of this action has been, a bona-fide resident and inhabitant of the Territory of Alaska, and now resides at Anchorage, Territory of Alaska.

II.

That plaintiff and defendant intermarried at Wasilla, Territory of Alaska, on or about the 14th day of January, 1938, and ever since said date have been and now are wife and husband, respectively.

III.

That no children have been born the issue of the marriage of plaintiff and defendant, but that the parties have raised the daughters of the plaintiff

by a former marriage, namely, Jacquelyn Paddock, now of the age of eighteen years, and Arlene Paddock, now of the age of nineteen years.

IV.

That there is a question of property rights here presented to the Court for determination.

V.

That there is an incompatibility of temperament existing between the plaintiff and the defendant, in the following particulars, to-wit: That the likes and dislikes of the parties are greatly divergent, so that there has been a great deal of arguing and bickering between the parties about all manner of things; that the plaintiff and defendant have no common interests or desires; and that defendant has been critical and fault-finding in his conduct toward plaintiff. That such incompatibility of temperament has existed for some time prior hereto, and as a result thereof plaintiff and defendant separated during the month of October, 1952, and have not since lived or cohabited together as wife and husband. That as plaintiff believes and so alleges the fact to be, it will never be possible for plaintiff and defendant to live together amicably as wife and husband, and there is no possibility of a reconciliation between them. That plaintiff has at all times since said marriage endeavored to resolve the differences between the parties and is without fault in the matter.

Wherefore, plaintiff prays for judgment as follows:

(1) That the bonds of matrimony heretofore and now existing between the plaintiff and the defendant may be set aside and held for naught.

(2) That the property rights of the parties hereto may be determined by the Court.

(3) For such other and further relief as to the Court shall seem meet and equitable in the premises.

DAVIS, RENFREW & HUGHES,

Attorneys for the Plaintiff

/s/ By EDWARD V. DAVIS

Duly Verified.

[Endorsed]: Filed July 23, 1953.

[Title of District Court and Cause.]

ANSWER AND COUNTER-CLAIM

Comes now the defendant in the above-entitled cause and answering the Complaint herein, alleges:

I.

Defendant admits the allegations of paragraphs I, II, III and IV of the Complaint herein.

II.

Defendant admits the allegation of paragraph V of the Complaint herein that there is an incompatibility of temperament existing between the parties;

defendant denies each and every other allegation contained in said paragraph V, and specifically denies that the plaintiff has endeavored to resolve any differences between the parties, and denies that plaintiff is without fault in the matter.

Counter-Claim

And for a Counter-Claim or a Cross-Action against the plaintiff, defendant alleges:

I.

That defendant is now and has been for more than two years prior to the commencement of this action, a bona fide resident and inhabitant of the Territory of Alaska, living and residing at Anchorage.

II.

That defendant and plaintiff were married on the 14th day of January, 1938, at Wasilla, Alaska, and are still married.

III.

That no children have been born as the issue of this marriage.

IV.

That there are conflicting interests between the parties in property acquired during the marriage which should be determined by the Court.

V.

That there is an incompatibility of temperament existing between the plaintiff and the defendant, in

that animosity has grown between them over a variety of matters during the past several years; that the plaintiff has been extravagant and unco-operative in the recent course of their married life and has harrassed and injured defendant in the conduct of his business; that the plaintiff has been guilty of misconduct with other persons of a nature to cause defendant humiliation and embarrassment with another person or persons; that as a result of the plaintiff's misconduct, it has become impossible for them to live together peacefully as husband and wife; that defendant has at all times conducted himself as a reasonable person and is without fault.

Wherefore, defendant prays:

1. That plaintiff take nothing by virtue of her complaint and that the same be dismissed.
2. That defendant be granted an absolute divorce from plaintiff on his counter-claim herein, and that the marriage of the defendant and plaintiff be dissolved and held for naught.
3. That the property rights of the parties be adjudged and determined by the court.
4. For such other and further relief as shall be just.

KAY, ROBISON & MOODY,

Attorneys for Defendant

/s/ By WENDELL P. KAY

Duly Verified.

Acknowledgment of Service attached.

[Endorsed]: Filed Nov. 20, 1953.

[Title of District Court and Cause.]

MOTION FOR TEMPORARY RESTRAINING
ORDER AND FOR ORDER TO SHOW
CAUSE

Comes now the defendant above named, by and through his attorneys, Kay, Robison & Moody, and moves the Court for an order directing the plaintiff herein to appear and show cause at 4:30 o'clock p.m., on the 24th day of November, 1953, or as soon thereafter as counsel can be heard, why she should not be ordered, restrained and enjoined as follows:

1. From entering on or about the premises or building known as Paddock's Paint and Furniture Store, at 812 Fourth Avenue, Anchorage, Alaska;
2. From interfering with the conduct of said business; and
3. From harrassing and annoying defendant and the employees and customers at said place of business.

KAY, ROBISON & MOODY,
Attorneys for Defendant

/s/ By WENDELL P. KAY

Acknowledgment of Service attached.

[Endorsed]: Filed Nov. 20, 1953.

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF MOTION FOR
TEMPORARY RESTRAINING ORDER
AND FOR ORDER TO SHOW CAUSE

United States of America,
Territory of Alaska—ss:

Harold D. Paddock, being first duly sworn, deposes and says:

That he is the defendant in the above-entitled cause and has verified the Answer and Counter-Claim heretofore filed by him in this action; that he is the owner and manager of Paddock's Paint and Furniture Store, at 812 Fourth Avenue, Anchorage, Alaska; that he and the plaintiff herein have been separated since about the first of the year 1953, during which time the plaintiff and defendant have been attempting to arrange for a peaceful settlement of their differences over the property owned by either of them and acquired during their marriage. That defendant has always been the owner and manager of the said business, and it has been and now is in his name; that the plaintiff has taken little, if any, interest in the operation or management of the business and is not familiar with it, nor is she capable of managing and operating the said business; that during the year 1953, at various times, particularly when negotiations for a property settlement have been deadlocked, plaintiff has come into the store and attempted to usurp or take over the management and operation of the

business; that during the past several days, plaintiff has again entered the store on several occasions, attempted to deal with customers in the store as though she were the proprietor thereof, has informed employees that she is "taking over the business" and otherwise conducted herself in such a manner as to confuse the customers and employees of the business; that the aforesaid conduct of the plaintiff is not in any way intended to assist in the successful management of the business, but is intended to harrass and annoy defendant and force him to accede with her wishes with regard to a property settlement; that the effect of this conduct is to cause unrest and dissatisfaction among the employees, annoyance to the customers and a consequent disastrous effect upon the business; that the plaintiff will, unless restrained, continue to employ these harrassing techniques to the loss of all parties concerned.

/s/ HAROLD D. PADDOCK

Subscribed and sworn to before me this 18th day of November, 1953.

[Seal] /s/ WENDELL P. KAY,
Notary Public in and for Alaska

Acknowledgment of Service attached.

[Endorsed]: Filed Nov. 20, 1953.

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE AND TEMPORARY RESTRAINING ORDER

Upon reading the Answer and Counter-claim of the defendant, on file herein, the Motion of Kay, Robison & Moody, Counsel for defendant, and the affidavit of Harold D. Paddock in support thereof, and good cause appearing therefrom,

It is hereby ordered as follows:

1. That the plaintiff appear and show cause on the 24th day of November, 1953, at 4:30 o'clock p.m., of said day, or as soon thereafter as Counsel can be heard, before the above-entitled Court, why she should not be ordered, enjoined and restrained as follows:

a. Restrained and enjoined from entering on or about the premises or building known as Paddock's Paint and Furniture Store, at 812 Fourth Avenue, Anchorage, Alaska;

b. Restrained and enjoined from interfering with the conduct of said business.

c. Restrained and enjoined from harrassing and annoying defendant and the employees and customers at said place of business.

2. That a copy of the Answer and Counter-claim and Motion for Temporary Restraining Order and for Order to Show Cause and supporting affidavit be served upon the plaintiff forthwith, and at least three days before said date of hearing.

3. That it appears that the plaintiff is presently harrassing and annoying defendant at the premises or building known as Paddock's Paint and Furniture Store; that unless plaintiff is restrained and enjoined from continuing, the business will suffer irreparable damage, and it is further ordered:

4. That until the hearing upon said Order, and until further Order herein, the plaintiff, her attorneys, agents and servants are hereby

a. Restrained and enjoined from entering on or about the premises or building known as Paddock's Paint and Furniture Store, at 812 Fourth Avenue, Anchorage, Alaska.

b. Restrained and enjoined from interfering with conduct of said business.

c. Restrained and enjoined from harrassing and annoying defendant and the employees and customers at said place of business.

/s/ J. L. McCARREY, JR.,

Judge of the District Court

Acknowledgment of Service attached.

[Endorsed]: Filed Nov. 20, 1953.

[Title of District Court and Cause.]

ANSWER TO COUNTERCLAIM

Comes now Florence Paddock the above named plaintiff and in answer to the counterclaim of the defendant, admits, denies and alleges as follows:

I.

Plaintiff admits the first, second, third and fourth paragraphs of defendants counterclaim.

II.

Plaintiff denies each and all of the allegations of the fifth paragraph of defendant's counterclaim insofar as such allegations differ from the allegations contained in plaintiff's complaint. Plaintiff specifically denies that she has been extravagant, unco-operative or that she has harrassed or injured defendant in the conduct of his business. Plaintiff further denies that she has been guilty of misconduct in any manner whatsoever and alleges that the trouble between the parties arises from misconduct of the defendant over a period of several years.

Wherefore, having fully answered defendant's counterclaim, plaintiff prays that defendant take nothing thereby and that plaintiff may have and recover judgment and decree in this matter according to the allegations of her complaint.

DAVIS, RENFREW & HUGHES,
Attorneys for Plaintiff

/s/ By EDWARD V. DAVIS

Duly Verified.

Acknowledgment of Service attached.

[Endorsed]: Filed Nov. 24, 1953.

[Title of District Court and Cause.]

OATH OF MASTER

Harry Godchaux, being first duly sworn on oath, deposes and says:

I do solemnly swear that I will support the Constitution of the United States and the laws of the Territory of Alaska, and that I will faithfully discharge the duties of Master in the above entitled action to the best of my ability, and that I will obey the orders of this Court, or the Judge thereof, in respect thereto.

So help me God.

/s/ HARRY GODCHAUX

Subscribed and sworn to before me this 23rd day of December, 1953.

[Seal] /s/ LOUISE STRAHORN,
Deputy Clerk, U. S. District
Court

Approved:

/s/ J. L. McCARREY, JR.
District Judge

[Endorsed]: Filed Dec. 23, 1953.

[Title of District Court and Cause.]

MOTION TO REOPEN CASE AND TO SET
ASIDE ALL PREVIOUS ORDERS MADE

Comes now the above named Defendant, Harold D. Paddock, by and through his attorneys of record, Bell & Sanders, and moves this Honorable Court for an Order to Reopen this case for further testimony and to Set Aside all Previous Orders made in said case, and for grounds states:

That the Defendant is informed and believes, and is quite confident that he can prove by a preponderance of the evidence that the Plaintiff is living in adultery with a man in the City of Anchorage in the home property of this Defendant, and that an immoral contact and relationship between the Plaintiff and this other man has been going on from a time prior to the separation of this Defendant and the Plaintiff;

The Defendant further expects to show to the Court the true value of all of the property belonging to the Defendant;

The Defendant further expects to show that there never was any semblance of partnership between the Plaintiff and the Defendant;

That the Plaintiff never really worked steadily even as a clerk in the Defendant's business, but most of the time she was there to cause trouble and disturbances, and very often created scenes in the store very detrimental to the Defendant and to his business;

This Defendant further will be able to show to the Court the actual value of the properties that he owned prior to the marriage, which have grown into large values by reason of the natural enhancement of property in Anchorage, and through no effort whatsoever on the part of the Plaintiff, and the values of which are now included as a part of the properties of the Defendant, or are a part of which have been sold and the money used to enhance the value of the Defendant's assets;

The Defendant further expects to prove that by the Plaintiff's conduct, he was driven from his home and forced to seek living quarters in the store building where he operated the paint and furniture business, which property is a part of the Defendant's present estate, and was at that time.

Dated at Anchorage, Alaska, this 25th day of January, 1954.

BELL & SANDERS,

/s/ By BAILEY E. BELL,

Attorneys for Defendant

Duly Verified.

Acknowledgment of Service attached.

[Endorsed]: Filed January 26, 1954.

[Title of District Court and Cause.]

HEARING ON MOTION TO RE-OPEN CASE
AND SET ASIDE ALL PREVIOUS OR-
DERS MADE

Now at this time hearing on motion to re-open case and set aside all previous orders made came on regularly before the Court, in caunse No. A-8926, entitled Florence Paddock, Plaintiff, versus Harold D. Paddock, Defendant, the plaintiff represented by Edward V. Davis, of her counsel and the defendant represented by Bailey E. Bell, of his counsel. The following proceedings were had, to-wit:

Argument to the Court was had by Bailey E. Bell, for and in behalf of the defendant.

Argument to the Court was had by Edward V. Davis, for and in behalf of the plaintiff.

Whereupon the Court having heard the arguments of respective counsel and being fully and duly advised in the premises, announced it would reserve its decision in this cause.

Entered Journal June 25, 1954.

[Title of District Court and Cause.]

M. O. DENYING MOTION TO RE-OPEN CASE
AND TO SET ASIDE ALL PREVIOUS
ORDERS MADE

Now at this time, arguments having heretofore been had on the 25th day of June, 1954 in cause No. A-8926, entitled Florence Paddock, plaintiff, versus Harold D. Paddock, defendant.

Whereupon, Court now denies motion to re-open case and set aside all previous orders made.

Entered Journal July 28, 1954.

[Title of District Court and Cause.]

MEMORANDUM OPINION

John Edward J. Davis, attorney for Plaintiff.

Bailey E. Bell, attorney for Defendant.

The plaintiff, Florence Paddock brings this action for divorce upon the grounds of incompatibility and asks the court to determine the property rights of the parties.

In answer thereto, the defendant, Harold D. Paddock, admits the allegations of the complaint including the incompatibility of temperament but denies the remainder of that paragraph and then counterclaimed himself for a divorce likewise alleging incompatibility, and in addition thereto he alleges mis-conduct on part of plaintiff and alleges

that he has at all times conducted himself as a reasonable person and is without fault.

In reply to the Counterclaim the plaintiff admits all but the allegations of incompatibility which she denies insofar as such allegations differ from the allegations contained in her complaint and specifically denies the balance of the paragraph of her misconduct and alleges that the trouble between the parties arise from the misconduct of the defendant.

Subsequent to the completion of the trial in its entirety, the defendant by and through another attorney, filed a "Motion to Reopen the Case and to Set Aside All Previous Order Made," for the reason that the defendant * * *" is informed and believes and is quite confident that he can prove by a preponderance of the evidence that the plaintiff is living in adultery with a man in the City of Anchorage * * *" which motion was denied.

After opening statements had been made and the first witness had nearly completed her testimony counsel for the litigants orally stipulated that the defendant would not attempt to rebutt the incompatibility testimony given by the plaintiff and further stipulated that the only remaning segment of the action to be considered by the court was one of property determination of the parties.

I find that the plaintiff has sustained the burden of proof and that she is entitled to a divorce from the defendant.

Both plaintiff and defendant devoted their full time to the development of the business which they now own and, therefore, since there were no ex-

tenuating circumstances presented to the court, I find that each party is entitled to one-half of the real and personal property they acquired since marriage.

I find that the defendant had an investment in their present business of \$10,000.00, prior to the time plaintiff married the defendant.

I find that the plaintiff should have the furniture, house and lot known as Lot 3, Block 108, of the original townsite of Anchorage, Alaska, wherein the plaintiff now resides, at 226 East 7th, and that the value of said house is \$20,000.00.

I find that defendant should have the business, building and lot known as Paddock Paint & Furniture Store situate, lying and being, on Lot 2, and the East one foot, of Lot 3, in Block 39, of the Original Anchorage Townsite, subject to a one-half interest of the plaintiff. Such interest of the plaintiff shall be determined by three appraisers, one appraiser to be appointed by the plaintiff and one by defendant, and these two in turn to appoint a third and the decision reached by any two of the three appraisers shall be final. In arriving at the respective interests of the parties the appraiser shall take into consideration operating cost, taxes, etc., up to December 31, 1953. I further find that it would be to the best interest of both plaintiff and defendant that the defendant purchase the plaintiff's interest in and to said business at the price determined by the appraisers, aforesaid, and that one-fifth of the total purchase price to be paid to the plaintiff within 60 days after the entry of this

opinion and the balance in 48 equal monthly installments with 6% interest per annum on the remaining unpaid balances.

The appraisers are hereby instructed to first deduct from the plaintiff's interest in and to said business the sum of \$30,000.00 which is the amount found to be that interest the defendant had in and to said business before he married the plaintiff and the value of Lot 3, of Block 108, of the Original Townsite (*supra.*).

I find that both plaintiff and defendant are entitled to a monthly wage of \$700.00 each for the entire year 1953 and that the plaintiff and defendant shall be credited or debited such sum in accordance with their drawings for that year, as the books of the company will reflect, but should the books reveal that one of the parties, either through money or any other thing of value, may have withdrawn or appropriated a sum in excess of \$8,400.00 for the year 1953, allowed for wages of the parties, aforesaid, then such excess shall be taken into consideration by the appraisers in arriving at the value of the respective interests of the parties in the Paddock Paint & Furniture Store business.

I further find that the plaintiff and defendant are each entitled to a one-half undivided interest in and to all of the remaining real and personal property belonging to them as of December 31, 1953. I further find that if either party has appropriated or disposed of any real or personal property which was acquired during coverture, either prior or subsequent to the filing of the divorce proceedings

(without accounting for the same to the other party), the appraisers are hereby instructed to take such facts into consideration, when determining the value of the plaintiff's and the defendant's interest, in and to the business owned by the parties, and the appraisers are hereby empowered to take whatever steps may prove necessary to discover said assets of the parties.

While plaintiff made application to the court for temporary support and maintenance and attorney fees, I find from the record that only the restraining order was signed and that the cause went to trial before the support and maintenance and attorney fees were determined by the court.

I find that the plaintiff is entitled to receive from the defendant \$500.00 per month, for temporary support from January 1954 until October 31, 1954, and that this sum should be paid to plaintiff forthwith. I further find that the plaintiff is not entitled to alimony but that she is entitled to attorney fees in the sum of \$475.00 and usual court costs.

Findings of fact and conclusions of laws and decree may be prepared in accordance with the foregoing.

Dated at Anchorage, Alaska, this 8th day of October, 1954.

/s/ J. L. McCARREY, JR.
District Judge.

[Endorsed]: Filed Oct. 8, 1954.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled cause came on regularly for hearing at the court room of the above entitled Court at Anchorage, Alaska on the 22nd day of December, 1953, before the Honorable J. L. McCarrey, Jr., District Judge, sitting as a Court of equity and without the aid of a jury. The plaintiff Florence Paddock was personally present in Court together with Edward V. Davis, one of her attorneys. The defendant Harold D. Paddock was likewise personally present in Court together with Wendell P. Kay, one of his attorneys. By stipulation in open Court it was agreed between the parties that the defendant would not contest the allegations of the plaintiff as to the incompatibility of the parties but that evidence would be given by both parties concerning the property belonging to the parties. Thereupon evidence was introduced on behalf of the plaintiff concerning the cause for divorce and evidence was introduced on behalf of both parties concerning the property belonging to the parties. Thereafter the Court appointed a Master to determine the value of the property belonging to the parties and the Court having heard the evidence in this matter and having considered the report of the Master appointed by the Court and being fully advised in the premises.

Now therefore on motion of Davis, Renfrew &

Hughes, attorneys for the plaintiff, and the Court having heretofore and on the 8th day of October, 1954, rendered its opinion in this matter now finds the facts in this matter to be as follows:

Findings of Fact

I.

That the plaintiff is now and for more than two years immediately preceding the commencement of this action has been a bona fide resident and inhabitant of the Territory of Alaska and now resides at Anchorage in the Territory of Alaska.

II.

That plaintiff and defendant intermarried at Wasilla in the Territory of Alaska on the 14th day of January, 1938, and ever since that date have been and now are wife and husband respectively.

III.

That no children have been born the issue of the marriage of the plaintiff and defendant but that the parties have raised the daughters of the plaintiff by a former marriage, namely, Jacquelyn Paddock and Arlene Paddock, now both over the age of 18 years.

IV.

That there is an incompatibility of temperament existing between the plaintiff and defendant which has existed for a considerable period of time and that such incompatibility has resulted in almost

continual bickering and quarreling between the parties and that it has become impossible for such parties to continue their marital relationship and that as a result thereof the plaintiff and defendant separated during the month of October, 1952, and have not since lived or cohabited together as wife and husband. That such incompatibility is such as to make it impossible for the parties to live together amicably as wife and husband and that there is no reasonable possibility of any reconciliation between the parties and that under the circumstances there is no reason for attempting to continue the marital relationship between the parties.

V.

That prior to the marriage of the parties, the defendant Harold D. Paddock was operating a certain business and had an investment at that time in such business in the amount of \$10,000.00.

VI.

That since the marriage of the parties the parties have both used their best efforts in operating and furthering the interests of the business known as Paddock's Paint Store operated by the defendant prior to the marriage of the parties and that such parties later opened a business known as Paddock's Furniture and Paint Store and that both of such parties worked in that business until the month of April, 1953, at which time the incompatibility of the parties was such that they could not both work in connection with the business and at that time the

plaintiff, at the request of the defendant, left such business.

VII.

That since their marriage plaintiff and defendant have acquired certain real and personal property as follows:

1. Lot 2 and the East one foot of Lot 3 in Block 39 of the Original Townsite of Anchorage, Alaska, together with a building thereon in which is conducted the business known as Paddock's Paint and Furniture Store.

2. The East 25 feet of Lot 9 of Block 29 of the Original Townsite of the City of Anchorage, Alaska, together with the buildings located thereon.

3. The West half of Lot 10 of Block 29 of the Original Townsite of the City of Anchorage, Alaska, together with part of a building thereon.

4. Lot No. 3 of Block No. 108 of the Original Townsite of Anchorage, Alaska, being the family residence together with the furniture and fixtures therein contained and thereunto appertaining.

5. A house and lot located at 234 East 7th Avenue, adjacent to the family home of the parties, being purchased under contract.

6. A certain small tract located at Anchor River, Alaska.

7. Certain real estate located in Mountain View, Alaska.

8. The business known as Paddock's Paint and Furniture Store at Anchorage, Alaska, including the merchandise inventory thereof and including

certain property being purchased in Spenard, Alaska, through the business.

VIII.

That in determining the value of the business known as Paddock's Paint and Furniture Store and the building in which such business is conducted, each of the parties should appoint one appraiser and those two appraisers to appoint a third appraiser and the decision of such appraisers when arrived at should be final as to the value of such business and property. In arriving at the value of the business and the business building above mentioned the appraisers should deduct the sum of \$30,000.00 from such value representing the value of the family home and the furnishings therein to be awarded to the plaintiff as hereinafter set forth in the amount of \$20,000.00 plus the sum of \$10,000.00 being the value of the interest of the defendant Harold D. Paddock in the business at the time of the marriage of the parties. Upon such deduction being made the remaining value of the business known as Paddock's Paint and Furniture Store and the building in which such business is conducted should belong equally to the plaintiff and to the defendant but the defendant should purchase the interest of the plaintiff therein at the value set as being the value of the plaintiff therein.

Conclusions of Law

From the foregoing, its findings of fact, the Court concludes the law in this matter to be as follows:

I.

Plaintiff in this action, Florence Paddock, is entitled to a decree of this Court dissolving absolutely the bonds of matrimony heretofore and now existing between plaintiff and defendant.

II.

Plaintiff is entitled to receive the family home, together with the furniture and fixtures therein contained and thereunto appertaining at and for a price of \$20,000.00 to be deducted from the value of the business known as Paddock's Paint and Furniture Store and the building in which such business is conducted.

III.

Defendant is entitled to a credit of \$10,000.00 on account of moneys he had invested in the business known as Paddock's Paint Store prior to the marriage of the parties and such \$10,000.00 shall be taken into consideration prior to the division of the value of such business and the building in which the business is conducted as hereinafter more fully set forth.

IV.

The business known as Paddock's Paint and Furniture Store, together with the building in which such business is operated known as Lot 2 and the East one foot of Lot 3 in Block 39 of the Original Townsite of Anchorage, Alaska, shall be appraised by three appraisers one of whom is to be appointed by the plaintiff, one by the defendant and the third

jointly by such two appraisers. Decision of such appraisers as to the value of such property is to be final. In arriving at the interests of the respective parties in such business and property the appraisers are to take into consideration operating costs, taxes and all other costs to and including December 31, 1953. In arriving at such values the appraisers likewise are to figure that each of the parties, the plaintiff and the defendant, are entitled to a monthly wage of \$700.00 for the entire year of 1953 and such parties are to be debited or credited as the case may be depending on whether such parties have or have not drawn an aggregate of \$8400.00 each for that year as wages. After determining the various interests of the parties as herein set forth then the defendant is to pay to the plaintiff the value of her interest in and to such business property and one-fifth of the purchase price thereof is to be paid to the plaintiff on or before December 8, 1954 with the balance to be paid on a contract of sale basis in 48 equal monthly installments with interest to be paid by the defendant to the plaintiff on the actual unpaid balance due from time to time at the rate of 6% per annum from the 8th day of December, 1954 until paid. If any property belonging to the parties has been disposed of by either of the parties since the 1st day of January, 1954 such property and the value thereof is to be considered by the appraisers in determining the interests of the respective parties in and to the property and business known as Paddock's Paint and Furniture Store and the building in which such business is conducted.

V.

Plaintiff and defendant are each entitled to an undivided one-half interest in and to all of the remaining real and personal property belonging to the parties except as to the property hereinabove described. Such parties, if able to agree may divide the respective properties between themselves in order to arrive at a fair division of such property. If the parties are unable to agree upon such fair division then the Court will order a division of the property or a sale of the property and a division of the proceeds as may seem most desirable for the interests of both parties.

VI.

Defendant Harold D. Paddock is hereby ordered to pay forthwith to the plaintiff support money in the sum of \$500.00 per month from January 1, 1954 to and including October 31, 1954.

VII.

Plaintiff is not entitled to any alimony in this matter.

VIII.

Plaintiff is entitled to her costs and disbursements in this action to be paid by the defendant and such costs and disbursements shall include the sum of \$475.00 toward plaintiff's attorney's fee.

Let Judgment and Decree be entered accordingly.

Done in Open Court at Anchorage, Third Judicial

Division, Territory of Alaska, this 22nd day of December, 1954.

/s/ J. L. McCARREY, JR.,
District Judge

We object to these findings.

/s/ BAILEY E. BELL,
Attorney for Defendant

Acknowledgment of Service attached.

[Endorsed]: Filed December 22, 1954.

In the District Court for the District of Alaska,
Third Division

No. A-8926

FLORENCE PADDOCK, Plaintiff,

vs.

HAROLD D. PADDOCK, Defendant.

DECREE

The above entitled cause came on regularly for hearing at the court room of the above entitled Court at Anchorage, Alaska on the 22nd day of December, 1953, before the Honorable J. L. McCarrey, Jr., District Judge, sitting as a Court of equity and without the aid of a jury. The plaintiff Florence Paddock was personally present in Court together with Edward V. Davis, one of her attor-

neys. The defendant Harold D. Paddock was likewise personally present in Court together with Wendell P. Kay, one of his attorneys. By stipulation in open Court it was agreed between the parties that the defendant would not contest the allegations of the plaintiff as to the incompatibility of the parties but that evidence would be given by both parties concerning the property belonging to the parties. Thereupon evidence was introduced on behalf of the plaintiff concerning the cause for divorce and evidence was introduced on behalf of both parties concerning the property belonging to the parties. Thereafter the Court appointed a Master to determine the value of the property belonging to the parties and the Court having heard the evidence in this matter and having considered the report of the Master appointed by the Court and being fully advised in the premises,

Now, Therefore, on motion of Davis, Renfrew & Hughes, attorneys for the plaintiffs, and the Court having heretofore rendered its Findings of Fact and Conclusions of Law in the matter, and being fully advised in the premises, it is hereby ordered, adjudged and decreed as follows:

1. The bonds of matrimony heretofore and now existing between the plaintiff and defendant in this matter are herewith dissolved and made of no further effect.

2. The defendant forthwith shall pay to the plaintiff support money for that portion of the year 1954 ending on the 31st day of October, 1954, at the

rate of \$500.00 per month, amounting to the sum of \$5,000.00, together with plaintiff's costs and disbursements in this action incurred, including the sum of \$475.00 towards plaintiff's attorney's fees.

3. As set forth in the Findings of Fact and Conclusions of Law the Court in this matter, plaintiff is to select one appraiser, defendant is to select one appraiser, and each of such appraiser is to select a third appraiser to determine the value of the business known as the Paddock's Paint and Furniture Store, including the value of the building which such business heretofore has been and is now being conducted. Upon determination of such value by the appraisers, a credit is to be allowed to the defendant in the amount of \$30,000.00 of such value, represented by the value of the family home and the furnishings therein contained which are herein decreed to the plaintiff, and representing the sum of \$10,000.00 invested by the defendant in the business known as Paddock's Paint Store prior to the marriage of the parties. Upon determining such value and applying the credit given as herein set forth, the resulting value of the business and the building and property in which such business is being conducted is to be divided equally between the parties, subject to adjustments according to the drawings of the parties in the year 1953. In determining the adjustment, each of the parties shall be entitled to the sum of \$8,400.00 as salaries for the year 1953 and the drawings of the parties are to be considered as being any drawing in excess of such sum of \$8,400.00 for that year. Upon such computation,

credit shall be given or deductions made as against the respective parties depending on the drawings made by the respective parties during the year 1953. Upon such computation it shall be determined as to the interest of the plaintiff in such business and the business property known as Lot 2 and the East one foot of Lot 3 in Block 39 of the Original Townsite of Anchorage, Alaska. Defendant is to purchase the interest of the plaintiff in and to such business and such property according to the computations and adjustments herein mentioned. The defendant forthwith shall pay to the plaintiff one-fifth of the price so determined as being the value of the plaintiff's interest in such business and property, and the balance of such sum is to be paid by the defendant to the plaintiff in forty-eight equal monthly installments commencing on the 8th day of January, 1955 and continuing monthly thereafter until such interest shall have been fully paid. The defendant is to pay to the plaintiff interest on the actual unpaid balance owing by the defendant to the plaintiff from time to time at the rate of 6% per annum, figured from the 8th day of December of 1954. The parties in order to carry out this provision of the settlement between the parties are to execute a contract of sale of the business known as Paddock's Paint and Furniture Store and of the real property above described, and the plaintiff shall execute and place in escrow a good and sufficient deed transferring to the defendant all of her right, title and interest in and to such business and property, with instructions to the escrow holder to deliver such deed, bill

of sale and other documents as may be required to the defendant upon full payment having been made by the defendant for such property.

4. Except as to the business and the property hereinabove described and except as to the family home which is given to the plaintiff at the price of \$20,000.00 as above mentioned, all of the other property, both real and personal, belonging to the parties is to be divided equally between the parties. If the parties are unable to agree upon an equitable division of such property, the Court upon application of either party will enter a further decree dividing such property between the parties.

5. The Plaintiff shall be entitled to receive the family home of the parties and described as Lot 3 of Block 108 of the Original Townsite of Anchorage, Alaska, together with the furniture, fixtures, equipment and supplies therein contained and thereunto appertaining as her own sole and separate property and free and clear of any claim of the defendant therein or thereto. Defendant is hereby ordered to execute a good and sufficient deed conveying all of his right, title and interest in and to such property to the plaintiff and is ordered forthwith to deliver such deed to the plaintiff.

6. Each of the parties to this action is hereby ordered to execute such deeds, bills of sale and other documents as may be necessary or desirable to carry out the provisions of this decree.

Done in open Court at Anchorage, Third Judicial

Division, Territory of Alaska, this 22nd day of December, 1954.

/s/ J. L. McCARREY, JR.,
District Judge

But object to any Decree at this time.

/s/ BAILEY E. BELL,
Attorney for Defendant

Acknowledgment of Service attached.

[Endorsed]: Filed and Entered December 22, 1954.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Comes now the above named Defendant, and moves this Honorable Court to grant a new trial in the above entitled equity action, and for grounds of said motion states:

I.

The opinion of the Court, the Findings of Fact and Conclusions of Law, and the Decree were signed prior to the Defendant having rested his case, all as called to the Court's attention in the motion to re-open the case and to set aside all previous orders made, which was filed in January of 1954.

II.

To set aside all opinions, Findings of Fact and

Conclusions of Law and Decree, for the reason that the same are inequitable and unjust, unreasonable and oppressive as against the Defendant, Harold D. Paddock; as the said opinions, Findings of Fact and Conclusions of Law and Decree are based upon a theory of partnership in the business known as Paddock's Paint and Furniture Store, when in truth and in fact, there was no partnership; that the property belonged to the said Harold D. Paddock before he married the Plaintiff and continued to belong to him at all times, and that the oral finding of the Court that there was a partnership between the parties is supported by no evidence; is against the clear weight of the evidence, and is against the law of the Territory of Alaska.

III.

That the first memorandum of opinion, filed on October 8, 1954, is contrary to the Findings of Fact and Conclusions of Law and therefore must have been signed and filed by inadvertance and mistake. The part of the opinion on page two wherein the Court found that both Plaintiff and Defendant devoted their full time in the development of the business is not substantiated by any evidence, is contrary to the great weight of the evidence, and the further finding that each party is entitled to one-half of the real and personal property they acquired since marriage is contrary to law, contrary to the evidence, and contrary to the great weight of the evidence. The next paragraph, in which the Court makes this statement: "I find that the Defendant

had an investment in the business of \$10,000.00 prior to the time Plaintiff married the Defendant", when the undisputed evidence showing a greater amount that \$10,000.00 was established, is in error. This finding should have been to the effect that the Defendant owned Lot 2 and the East one foot of Lot 3 in Block 39 of the Original Townsite of Anchorage, Alaska, and also owned the property across the street therefrom known as the Sunshine Market, prior to his marriage to the Plaintiff, and those properties should have been given to the Defendant free and clear of any claim of the Plaintiff. The Court, by its opinion filed on October 8, 1954, further made a finding giving the Plaintiff \$700.00 monthly salary for the entire year of 1953, when the evidence shows she did not work in the business during that period of time.

IV.

By said opinion, the Court ordered three appraisers to be chosen, one to be appointed by the Plaintiff, one by the Defendant, and the two in turn to appoint a third, and the decision reached by any two of the three appraisers would be final, and made certain requirements in said finding in the balance of said Paragraph which had not been met at the time of the signing of the purported Findings of Fact and Conclusions of Law and Decree, which documents were signed over the objections of the Defendant. The Court erred in making the last finding, which reads as follows: "I find that the Plaintiff is entitled to receive from the Defendant

\$500.00 per month for temporary support from January 1954 until October 31, 1954", this being inequitable and unfair due to the other findings in the opinion.

V.

That the fifth paragraph of the Findings of Fact is contrary to the law and contrary to the facts; that all evidence showed that the Defendant, Harold D. Paddock, owned certain property prior to the marriage which far exceeds the amount found as to the investment of the said Harold D. Paddock. In paragraph VI should be set aside for the reason it is contrary to the evidence, that there was no substantial evidence at all that the Plaintiff worked in the business until the month of April, 1953; that paragraph VII should be deleted and stricken from the Findings of Fact for the reason that there is no evidence anywhere that the Plaintiff had anything to do with acquiring the real estate set forth in this finding, save and except the house and lot located at 234 East Seventh Avenue, adjacent to the family home of the parties; that the evidence shows that all and the rest of said property was acquired without any effort on the part of the Plaintiff. That the Conclusion of Law number III is erroneous and does not follow the evidence in the case and should be a finding of certain property owned by the Defendant prior to his marriage to the Plaintiff, and should find a greater amount than \$10,000.00 as the value of his investment in the business known as Paddock's Paint and Furniture Store prior to the marriage of the parties. That the portion of Con-

clusion of Law number IV granting the Plaintiff \$700.00 per month wages for the entire year of 1953 is completely against the evidence in the case showing that she had nothing whatsoever to do with the business and paid no attention to and spent no time in helping therein after the 1st of April, 1953.

VI.

Paragraph V of the Conclusions of Law should be set aside, vacated and deleted from the Conclusions of Law for the reason that it is contrary to the laws of the Territory of Alaska, and contrary to all of the evidence in this case. That Paragraph VI of the Conclusions of Law should be deleted for the reason there is no law justifying or facts justifying the order made therein, that is, the Defendant pay to the Plaintiff \$500.00 per month, commencing January 1, 1954, and including October 31, 1954, in view of the Decree rendered herein. To delete and set aside from the Decree signed herein on the 22nd day of December, 1954, the following: Paragraph II thereof in its entirety, save and except the attorney's fees of \$475.00 for the Plaintiff's attorneys, and upon the deletion of the remainder of Paragraph II the Defendant tenders \$475.00 to the Plaintiff's attorneys. That Paragraph III of the Decree be deleted, as it is not supported by the evidence, is contrary to the evidence, and is contrary to law and should be reduced to a reasonable and equitable requirement if permitted to stand at all.

Wherefore, the Defendant moves this Honorable

Court to correct the opinion, the Findings of Fact and Conclusions of Law, and the Decree, and also to grant a new trial so that the Defendant may be permitted to finish the trial of his case and to produce the necessary evidence to bring the true facts before the Court, and for such other and further relief as the Court deems just and equitable in the premises, and for general relief.

BELL & SANDERS,
/s/ By BAILEY E. BELL,
Attorney for Defendant

Acknowledgment of Service attached.

[Endorsed]: Filed January 3, 1955.

[Title of District Court and Cause.]

Paddocks Paint and Furniture Store
Anchorage, Alaska

BALANCE SHEET
December 31, 1953

[Jones & Anderson Letterhead]

February 14, 1955

The Honorable Judge for the District Court
Third Division, Territory of Alaska
Anchorage, Alaska

Sir:

In accordance with your instructions and the findings as set out in the Decree under date of Decem-

ber 22, 1954 in the matter of Florence Paddock, Plaintiff, vs. Harold Paddock, Defendant, the undersigned, together with Mr. William Odom, Public Accountant of Anchorage, Alaska, and Mr. William Renfro of the First National Bank of Anchorage, Alaska, have appraised that business known as Paddocks Paint and Furniture Store, Anchorage, Alaska, and present herewith as Exhibit "A" a Balance Sheet as of December 31, 1953 on Appraisal Basis showing the net interest of each party to be as follows:

Harold Paddock	\$67,069.74
Florence Paddock	22,194.95

A total net worth of.....\$89,264.69

In arriving at this total net worth, certain factors were of necessity assumed. First, audit procedures usually followed were not feasible due to the passage of time. For example, it was not possible to determine the amount of Cash on Hand except by inspection of Bank statements and by verifying that sales for the last few days of 1953 were treated as deposits in transit at December 31, 1953.

Accounts Receivable, \$17,909.09, represents Accounts Receivable as 'good and collectible'. In other words, possible bad accounts had already been deducted from the receivables as shown at December 31, 1953. There is nothing available to us to indicate which of the accounts treated as 'bad', later were collected.

The inventory of merchandise is the figure used

in filing joint income tax returns and therefore may be assumed to represent mutual agreement by the parties.

The item "Income Tax Refund Receivable", \$2,022.04, was received subsequent to December 31, 1953 for the year 1953 and accordingly must be assumed to have been a receivable at that date.

The Fixed Assets of Furniture, Fixtures, Trucks, and Equipment represent values mutually agreed upon by the undersigned and Mr. Odom. We were, however, unable to mutually agree upon the value of the Real Estate described and accordingly called in Mr. Renfro and a fair value of \$55,000.00 was accepted by all concerned.

Other Assets and Prepaid Expenses are as reflected in the books of the business and again were not subject to verification due to the passage of time.

The Current Liabilities are as reflected by the books of the company. The only item which could be verified was "Notes Payable", \$27,000.00.

The Capital Accounts as shown reflects the distribution of the worth of the business in accordance with your instructions, giving credit to Mr. Paddock of \$30,000.00 for an original \$10,000.00 investment prior to marriage, and for \$20,000.00 to offset the withdrawal by Mrs. Paddock of the family home.

The item of \$30,000.00 to Mr. Paddock resulted in considerable discussion between Mr. Odom and the undersigned due to the instructions of the Court that "the appraisers are hereby instructed to first deduct from Plaintiffs interest in and to said busi-

ness, the sum of \$30,000.00 which is found * * *".

That instruction was interpreted by Mr. Odom to mean that after Mrs. Paddock's interest had been determined, an additional \$30,000.00 would be deducted from that interest and credited to Mr. Paddock.

As opposed to that Interpretation, the undersigned quotes item 3 of the Decree, "upon determination of such value by the appraisers, a credit is to be allowed to the defendant in the amount of \$30,000.00 of such value, represented by the value of the family home * * *, and representing the sum of \$10,000.00 invested by the defendant * * * prior to marriage".

The undersigned interprets the Decree to mean that \$30,000.00 of the value of the business is to be credited to Mr. Paddock and not \$30,000.00 of Mrs. Paddock's interest in the business. In support of that contention, we submit that the value of a business as defined by accounting is "the Assets minus the Liabilities", in this case Assets \$137,156.24 minus the Liabilities" of \$47,891.55 or \$89,264.69. By the Decree, the value is to be split by "first crediting Mr. Paddock with \$30,000.00, crediting each party with \$8,400.00 as salary and charging each party with their respective drawings: upon determining such value—the resulting value is to be divided equally". The results of this interpretation are as shown on the attached Exhibit "A".

No value has been placed upon the business for "Goodwill or Enterprise Valuation" as it appears from the income tax returns that the net earnings

of the company do not warrant such a valuation. Further, no value has been placed on other properties owned by the parties. Such properties include that location known as the "Sunshine Market" property and the "Spenard Warehouse". No valuation has been placed thereon as item 4 of the Decree sets out the procedure for establishing those values.

It is the opinion of the undersigned, subject to the above comments, that Exhibit "A" attached fairly presents the interest of the parties in accordance with the Decree and the instructions of the Court.

In the absence of specific instructions, this report is being delivered one copy to the Attorney for the Defendant, Mr. Bailey Bell; one copy to the Attorney for the Plaintiff, Mr. E. V. Davis; and one copy to the Court.

Respectfully submitted,

JONES & ANDERSON,
/s/ GEORGE R. JONES

EXHIBIT "A"

PADDOCKS PAINT AND FURNITURE STORE

Anchorage, Alaska

BALANCE SHEET AS OF DECEMBER 31, 1953 ON APPRAISAL BASIS

ASSETS

Current Assets:

Cash on Hand and in Banks.....	\$ 5,140.04
Accounts Receivable	17,909.09
Inventory, Merchandise	48,625.13
Income Tax Refund Receivable.....	2,022.04

Total Current Assets.....	<hr/>	\$ 73,696.30
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Fixed Assets: (As Appraised)

Furniture, Fixtures, Trucks, Equipment \$ 6,737.48

Real Estate, Lot 2 and E. 1 Ft. Lot 3,

Bl. 39, and Buildings 55,000.00

Total Fixed Assets	61,737.48
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Other Assets and Prepaid Expenses:

Prepaid Deposits\$ 110.00

Prepaid and Unexpired Insurance..... 1,612.46

Total Other Assets and Prepaid Expenses	1,722.46
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Total Assets	\$137,156.24
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LIABILITIES

Current Liabilities:

Accounts Payable\$ 14,437.14

Payroll and Withholding Taxes..... 1,349.15

Accrued Expenses 5,105.26

Notes Payable 27,000.00

Total Current Liabilities	\$ 47,891.55
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Capital:	Harold Paddock	Florence Paddock	Total
Charges against Capital:			
Drawing Account	\$ 1,645.47	\$16,520.27	\$ 18,165.74
Credits to Capital:			
For House	\$30,000.00		\$ 30,000.00
Salary	8,400.00	\$ 8,400.00	16,800.00
One half of remain- ing Capital	30,315.21	30,315.22	60,630.43
Total Credits	\$68,715.21	\$38,715.22	\$107,430.43
Balance	\$67,069.74	\$22,194.95	89,264.69
Total Liabilities and Capital.....			\$137,156.24

[Endorsed]: Filed February 18, 1955.

[Title of District Court and Cause.]

REPORT TO COURT OF AUDIT

To: The Honorable J. L. McCarrey, Jr., District Judge, Third Judicial Division, Territory of Alaska:

In compliance with your instructions and the typewritten Opinion and the Findings of Fact and Conclusions of Law in the matter of Florence Paddock, Plaintiff, vs. Harold D. Paddock, Defendant, the undersigned, together with George R. Jones, endeavored to carry out an appraisal to determine the separate interests of the Plaintiff and the Defendant in the business known as Paddock's Paint and Furniture Store, in Anchorage, Alaska, and presents herewith a balance sheet based upon the Memorandum Opinion issued by the Honorable J. L. McCarrey, Jr., District Judge, on the 8th day of October, 1954.

The value of a business being the assets minus the liabilities, in this case \$137,156.24 minus \$49,765.20, then the value of the business known as Paddock's Paint and Furniture Store is \$87,391.04, which value is divided in accordance with the Memorandum Opinion as follows:

Florence Paddock	\$36,258.37
Harold D. Paddock	51,132.67

\$87,391.04

Then, further in accordance with Paragraph 2,

Page 3 of the Memorandum Opinion \$30,000.00 was to be deducted from Mrs. Paddock's interest in the business, leaving Mr. Paddock owing Mrs. Paddock \$6,258.37 as her interest in the business which he was to purchase.

In calculating the interest of each of the parties under the Memorandum Opinion, I arrived at the facts as follows, to-wit:

PADDOCK'S PAINT AND FURNITURE STORE

Balance Sheet as of December 31st, 1953

On Appraisal Basis

ASSETS

Current Assets:

Cash on Hand and in Banks.....	\$ 5,140.04
Accounts Receivable	17,909.09
Inventory, Merchandise	48,625.13
Income Tax Refund Receivable.....	2,022.04

Total Current Assets.....	\$ 73,696.30
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Fixed Assets: (As Appraised)

Furniture, Fixtures, Trucks, Equipment \$	6,737.48
Real Estate, Lot 2 and E. 1 Ft. Lot 3, Bl. 39, and Buildings	55,000.00

Total Fixed Assets	61,737.48
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Other Assets and Prepaid Expenses:

Prepaid Deposits	\$ 110.00
Prepaid Insurance	1,612.46

Total Other Assets and Prepaid Expenses	1,722.46
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Total Assets	\$137,156.24
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LIABILITIES

Current Liabilities:

Accounts Payable	\$ 14,437.14
Payroll and Withholding Taxes.....	1,349.15
Accrued Expenses	5,105.26
1953 Income Tax Payable.....	1,873.65
Notes Payable	27,000.00

Total Current Liabilities	\$ 49,765.20
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Capital:	Harold Paddock	Florence Paddock	Total
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Charges against Capital:

Drawing Account	\$ 1,645.97	\$16,520.27	\$ 18,166.24
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Credits to Capital:

For wages allowed	8,400.00	8,400.00	16,800.00
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Half of remain- ing capital	44,378.64	44,378.64	88,751.28
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Total Credits	52,778.64	52,778.64	105,557.28
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Balance	51,132.67	36,258.37	87,391.04
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Total Liabilities and Capital	\$137,156.24
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Then I worked with Mr. Jones on the Decree dated December 22nd, 1954, signed by the Honorable J. L. McCarrey, Jr., District Judge, and following that Decree, I arrived at the following figures, to-wit:

Capital:	Harold Paddock	Florence Paddock	Total
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Charges against Capital:

Drawing Account	\$ 1,645.97	\$16,520.27	\$ 18,166.24
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Credits to Capital:

For wages allowed	8,400.00	8,400.00	16,800.00
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For House	30,000.00		30,000.00
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Half of remain- ing capital	29,378.64	29,378.64	58,757.28
Total Credits	67,778.64	37,778.64	105,557.28
Balance	66,132.67	21,258.37	87,391.04
			<u>\$137,156.24</u>

You will notice that the Decree does not follow the Memorandum Opinion and consequently a different figure has been arrived at by reason thereof.

Following the Memorandum Opinion, you will note that Mrs. Paddock has \$6,258.37 remaining as her interest in the business after the sum of \$30,000.00 has been deducted from her interest in accordance with Paragraph 2, Page 3 of the Memorandum Opinion.

Following the Decree, Mrs. Paddock would have \$21,258.37 due her.

Therefore, a difference exists between the Memorandum Opinion and the Decree as filed, and the interpretation thereof by Mr. Jones, of \$15,000.00.

I have submitted the two sets of figures because I felt that it was more fair to the Court and to all parties concerned.

I have carefully analyzed Mr. Jones' figures in the Balance Sheet of December 31st, 1953, filed with the Court, and I find that Mr. Jones has listed as an Asset, "Income Tax Refund Receivable" in the amount of \$2,022.04. However, Mr. Jones failed to deduct as a Liability the accrued indebtedness of income tax in the sum of \$1,873.65, which had to be

paid before the refund could be collected. Therefore, Mr. Jones' figure of \$89,264.69 is incorrect to the extent of \$1,873.65, making the actual value of the assets, over and above the liabilities, \$87,391.04 instead of \$89,264.69. This, of course, is merely an error in figures, but it clearly effects the resulting calculated interest of each of the parties to that extent.

It is also to be considered by the Court that Mrs. Paddock has received in the year 1954, \$1,856.49, and that various bills have been paid and are still being paid for her in 1955, which drawings of course are not included in the above figures.

Respectfully submitted,

/s/ W. P. ODOM

Acknowledgment of Service attached.

[Endorsed]: Filed February 21, 1955.

[Title of District Court and Cause.]

EXPLANATION OF REPORT OF AUDITOR

To: The Honorable J. L. McCarrey, Jr., District Judge, Third Judicial Division, Territory of Alaska.

As per understanding in Court at the time Mr. Jones, auditor appearing on behalf of Mrs. Paddock, filed an explanation of his figures, Mr. Odom, not having the time to prepare his figures, did make a rough draft in just a few moments, and

now we wish to substitute this more complete report for the pencilled figures handed in at that time and ask this Honorable Court to take into consideration in arriving at his judgment in this case said report.

Dated at Anchorage, Alaska, this 5th day of March 1955.

BELL & SANDERS,
/s/ By BAILEY E. BELL,
Attorneys for Defendant

Mr. Bailey Bell, Attorney-at-Law March 3, 1955
Anchorage, Alaska

Dear Sir:

Investigation discloses that the amount of \$1,873.65 which was listed as a liability in the figures which I formerly presented to you pertaining to Paddock's Paint & Furniture Store should not have been listed as a liability as this amount was already accounted for in the calculations.

Therefore I have revised my figures and in accordance with what I think is the intent of the court and in agreement with the memorandum opinion of said court dated October 8, 1954 wish to present the following:

The value of the business known as Paddock's Paint & Furniture would be the Assets of the Business minus the Liabilities which would give the value of the business, in this case:

Assets: \$137,156.24

Liabilities: \$47,891.55

Value of Business: \$89,264.69

Now after taking into effect the drawings and

the wages as instructed to by the memorandum opinion, the respective interests of each party in the above business would be:

Mrs. Paddock: \$37,195.20

Mr. Paddock: \$52,069.49

Total: \$89,264.69 (This total is value of the Business above.)

It is my understanding that if the division of the Business were to be made at this point, then Mr. Paddock would buy from Mrs. Paddock her share of the business which is as above, \$37,195.20, but according to memorandum opinion and also the verbal instructions of Judge McCarrey it was intended that Mr. Paddock should be given \$10,000.00 for his interest in the business prior to his marriage, and that he should also be given \$20,000.00 for the equivalent value of the home which Mrs. Paddock is retaining.

Therefore, if Mr. Paddock were going to buy Mrs. Paddock out of the business, but is to be allowed \$30,000.00 for the foregoing, the figures would then appear to be as follows:

Mrs. Paddock's value in the business: \$37,195.20.

Less the \$30,000.00 above: \$30,000.00.

Balance due Mrs. Paddock: \$7,195.20.

The above is based on the understood intent of the court to determine the interest of each party in the business and to then equalize the distribution of any monies due Mrs. Paddock by giving Mr. Paddock \$30,000.00 for his pre-marriage interest in the business and also for the house valued at \$20,000.00.

All of the foregoing figures are substantiated by

calculations on work sheets which I am retaining and would be willing to submit for further clarification.

The figure of \$7,195.20, as I understand it, would be subject to any drawing made by Mrs. Paddock in 1954 and 1955.

Respectfully submitted,

/s/ W. P. ODOM,

Box 1594, Anchorage, Alaska

Acknowledgment of Service attached.

[Endorsed]: Filed March 5, 1955.

[Title of District Court and Cause.]

M. O. RENDERING ORAL DECISION

Now at this time, this cause coming on to be heard before the Honorable J. L. McCarrey, Jr., District Judge, the following proceedings were had, to-wit:

Now at this time, Hearing in re. accounting having heretofore and on the 2nd day of March, 1955, been had in cause No. A-8926, entitled Florence Paddock, plaintiff, versus Harold D. Paddock, defendant and the Court having reserved its decision,

Whereupon the Court now renders oral decision and finds that the accounting submitted to the Court by George R. Jones is the Accounting by which this case is to be governed by and directs counsel for plaintiff to prepare Amended Findings of Fact and Conclusions of Law and Decree.

Entered Journal March 11, 1955.

[Title of District Court and Cause.]

M. O. DENYING MOTION FOR NEW TRIAL

Now at this time, this cause coming on to be heard before the Honorable J. L. McCarrey, Jr., District Judge, the following proceedings were had, to-wit:

Now at this time motion heretofore made by Bailey E. Bell, of counsel for defendant, in cause No. A-8926, entitled Florence Paddock plaintiff versus Harold D. Paddock.

Whereupon Court denied motion and in any event of appeal supersedeas Bond is set at \$20,000.00.

Entered Journal March 15, 1955.

[Title of District Court and Cause.]

TRANSCRIPT OF OPINION

On Friday, March 11, 1955, in open court at Anchorage, Alaska, the Honorable J. L. McCarrey, Jr., U. S. District Judge, rendered the following opinion:

The Court: The Court has a decision to render at this time. This will concern you, Mr. Davis. The Court will go back just a moment in the case of Paddock vs. Paddock, A-8926. This matter came to the Court's attention based upon a motion by the defendant, pointing out to the Court that the Court in its opinion—written opinion—had found one amount whereas in fact, the Findings of Fact and

Conclusions of Law and Decree had determined another amount and this was brought before this Court for a determination in trial on the 2nd day of March. At that time there were two accountants present in court—Mr. Odom and Mr. George R. Jones. From the evidence, it was difficult to arrive at a conclusion based upon the expert opinion of both Mr. Jones and Mr. Odom and therefore, at that time, the Court requested that Mr. Jones and Mr. Odom submit an additional accounting which was done. Now, the Court has gone over the additional accounting and has considered the entire case as a whole and finds that the accounting submitted by Mr. George R. Jones in plaintiff's Exhibit "Z" is the accounting as to which this case is to be governed by, that being the accounting carried out the intent of the Court, although not clearly set forth in the opinion from an accounting viewpoint and therefore, at this time, that is the opinion of the Court and the Court would ask Mr. Davis, attorney for the plaintiff, to prepare amended Findings of Fact and Conclusions of Law and Decree in conformance with that finding of the Court.

Mr. Davis: I presume that a short amendment of the particular paragraph will do, or do you want them all to be written?

The Court: No, just the paragraph in question, Counselor. I'd like to have you recite it, if you don't mind—the opinion and the paragraph in your findings and decree.

Mr. Davis: All right. Now, I wish the Reporter would make me a copy of the opinion just given so

that I can work from that and while we are talking about the matter, your Honor, I wonder—this motion, of course, is only part of another motion. Have you disposed of the entire motion?

The Court: No, in that respect, the Court then will continue this matter until Monday morning and render an opinion at that time. The court will stand adjourned until Monday morning at the hour of 9:30 o'clock a.m.

[Endorsed]: Filed March 26, 1955.

[Title of District Court and Cause.]

ORDER DENYING MOTION FOR NEW TRIAL

This matter came on regularly for hearing on the 11th day of February, 1955 and the 18th day of February, 1955, on defendant's motion for new trial and on the request of the Court for additional evidence concerning a claim by the defendant in the motion for new trial that the findings and conclusions and the decree entered by the Court on the 22 day of December, 1954 did not conform with the opinion of the Court dated October 8th, 1954, in certain respects as more fully set forth in the motion for new trial. The plaintiff was present by and through Edward V. Davis of her attorneys and the defendant was present by and through his attorney Bailey E. Bell. Defendant's motion for new trial was argued on behalf of the respective parties and

the Court heard additional evidence produced by both parties concerning the claimed conflict between the opinion and the findings of fact and conclusions of law and decree with reference to the deductions of the \$30,000.00 credit allowed to the defendant by reason of his original investment in the business and by reason of the family home being retained by the plaintiff. Thereupon the Court took the matter under advisement and on the 11th day of March, 1955 entered its oral opinion concerning the claimed conflict between the opinion and the findings of fact and conclusions of law and decree, and the Court in such opinion having found that the findings of fact and conclusions of law and the decree heretofore entered carried out the Court's intent in its opinion, dated October 8th, 1954, and that in so far as the findings of fact and conclusions of law and decree might differ from the Court's opinion that such findings of fact and conclusions of law and decree should govern, and the Court having directed the attorney for the plaintiff to prepare amended findings of fact and conclusions of law and decree in accordance with the findings of the Court, and it further appearing that the findings of fact and conclusions of law and decree of the Court heretofore entered on the 22nd day of December, 1954, actually set out the intent of the Court as to such matters and amended findings of fact and conclusions of law and amended decree in such respect would not change the findings and conclusions heretofore entered, and the Court being fully and duly advised in the premises:

Now Therefore, it is hereby ordered, adjudged and decreed as follows:

1. Defendant's motion for new trial in the above entitled action is hereby denied.

2. Findings of fact, conclusions of law and decree heretofore adopted and entered by this Court on the 22nd day of December, 1954, in the above entitled matter are hereby adopted and reaffirmed as being the findings of fact, conclusions of law and decree of the Court in the above entitled matter.

Done in Open Court at Anchorage, Alaska, Third Judicial Division, this 24th day of June, 1955.

/s/ J. L. McCARREY, JR.,
District Judge

Acknowledgment of Service attached.

[Endorsed]: Filed and Entered June 24, 1955.

[Title of District Court and Cause.]

HEARING ON MOTION TO FIX BOND

Now at this time, this cause coming on to be heard before the Honorable J. L. McCarrey, Jr., District Judge, the following proceedings were had, to-wit:

Now at this time Hearing on Motion to Fix Bond in cause No. A-8926, entitled Florence Paddock, plaintiff, versus Harold D. Paddock, defendant, came on regularly before the Court, plaintiff represented by Edward V. Davis, of counsel, defendant

represented by William H. Sanders, of counsel, the following proceedings were had, to-wit:

Argument to the Court was had by Edward V. Davis, for and in behalf of the plaintiff.

Argument to the Court was had by William H. Sanders, for and in behalf of the defendant.

Whereupon, the Court having heard the argument of respective counsel and being fully and duly advised in the premises, fixes Defendant's bond at \$25,000.00.

Entered Journal June 24, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: Florence Paddock, Plaintiff above named, and
to Honorable Edward V. Davis, her Attorney
of record:

Notice Is Hereby Given, that the Defendant herein, Harold D. Paddock, hereby appeals to the United States Court of Appeals for the Ninth Circuit, sitting in San Francisco, California, from the Judgment rendered herein overruling the Defendant's Motion for a New Trial, which Judgment is dated the 24th day of June, 1955, and from the Judgment as attacked by the Motion for a New Trial, which Judgment is dated the 22nd day of December, 1954, and which Judgment is by reference made a part of this Notice of Appeal as fully as if set out herein;

and from all Orders and Judgments rendered in the above entitled cause.

Dated at Anchorage, Alaska, this 2nd day of July, 1955.

BELL, SANDERS & TALLMAN,

/s/ By BAILEY E. BELL,

Attorneys for Defendant

Acknowledgment of Service attached.

[Endorsed]: Filed July 5, 1955.

[Title of District Court and Cause.]

AMENDED NOTICE OF APPEAL

To: Florence Paddock, Plaintiff above named; and
to Honorable Edward V. Davis, her Attorney
of Record:

Notice Is Hereby Given, that the Defendant herein, Harold D. Paddock, hereby appeals to the United States Court of Appeals for the Ninth Circuit, sitting in San Francisco, California, from the Judgment rendered herein overruling the Defendant's Motion for a New Trial, which Judgment is dated the 24th day of June, 1955, and from the Judgment as attacked by the Motion for a New Trial, which Judgment is dated the 22nd day of December, 1954, which Judgment granted the Plaintiff a divorce, \$5,000.00 support money, \$475.00 attorneys fees, \$8,400.00 as salary for the year of 1953, a division of the property, both real and per-

sonal, and gave to her certain property as her own, and which Judgment is by reference made a part of this Amended Notice of Appeal as fully as if set out herein in full; and from all Orders and Judgments rendered in the above entitled cause.

Dated at Anchorage, Alaska, this 13th day of July, 1955.

BELL, SANDERS & TALLMAN,

/s/ By BAILEY E. BELL,

Attorneys for Defendant

Acknowledgment of Service attached.

[Endorsed]: Filed July 14, 1955.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Wm. A. Hilton, Clerk of the above entitled court, do hereby certify that pursuant to the provisions of Rule 10 (1) of the United States Court of Appeals, Ninth Circuit, of Rules 75 (g) (o) of the Federal Rules of Civil Procedure, and of the designation of counsel for defendant, I am transmitting herewith the Original Papers in my office dealing with the above entitled action or proceeding, including plaintiff's exhibits 1, 2, 3, 4 and Z, defendant's exhibit Y, together with the court reporter's transcript of testimony taken at the trial of said cause on December 22, 1953.

The papers herewith transmitted constitute the

record on appeal from the judgment filed and entered in the above entitled action by the above entitled court on December 22, 1954, to the United States Court of Appeals, Ninth Circuit, San Francisco, California.

Dated at Anchorage, Alaska, this 17th day of August, 1955.

[Seal] /s/ WM. A. HILTON,
 Clerk

In the District Court for the District of Alaska,
Third Division

No. A-8926

FLORENCE PADDOCK, Plaintiff,

vs.

HAROLD D. PADDOCK, Defendant.

TRANSCRIPT OF PROCEEDINGS

Before The Honorable J. L. McCarrey, Jr., U. S.
District Judge.

Anchorage, Alaska, December 22, 1953; 10:00
o'clock a.m.

Appearances: Edward V. Davis, Attorney for the
plaintiff. Wendell P. Kay, Attorney for the de-
fendant. [1*]

* Page numbers appearing at top of page of original Reporter's
Transcript of Record.

The Court: This was the time set in the matter of Florence Paddock, plaintiff, vs. Harold D. Paddock, defendant, A-8926. The Court has heretofore talked with counsel for the respective parties and while the Court is assuming the fact to be that the principal problem is one of property determination, and after having read the pleadings it appears that is the big problem. Now, owing to the fact there is so much work pending before the court and for the further reason that this appears to be somewhat of an accounting problem more than any other particular thing, the Court at this time, with consent of Counsel, is going to refer the disposition as to the accounting to a Master and the Court is advised that both counsel have agreed upon the present accountant, Harry Godechaux, is that correct?

Mr. Kay: Correct.

Mr. Davis: Correct.

The Court: Therefore, under Rule 53, Rules of Civil Procedure, this question of accounting will be referred to the Master, Mr. Harry Godechaux. It is understood that conformant to subparagraph A of Rule 53 that Mr. Godechaux will be paid out of the estate of the respective parties as the Court does not have any funds nor can he appropriate funds from Fund "C" in order to make this payment. The Court feels that it will be to the advantage of both parties to have such a person, and in this case Mr. Godechaux, since he is so well acquainted with the facts [3] thereunder. Now, the Court doesn't want to be bound entirely as to findings of the Master, but the principal purpose is to compile statistical

information necessary for the Court to make a determination from that. The Court desires further to have proof as to the acquisition of the property and the participation in the operation of the business, which is now conducted by the parties in order that the Court will be able to attempt to equitably make a determination of the rights of the respective parties hereto. Now, does either counsel have any question as to the preliminary statement?

Mr. Kay: No, Your Honor.

Mr. Davis: I might, if I may, make just a brief statement here as to what I think the issues are here.

The Court: The Court would like to have you both make an opening statement in due course, but the Court at this time is inquiring as to his understanding and purpose of the Master?

Mr. Davis: I think I understand.

The Court: Very well, if that is the case, Mr. Kay, you may make your opening statement. You are for the plaintiff?

Mr. Kay: No, Mr. Davis represents the plaintiff. We happen to be occupying different pews. I can't get Mr. Davis to yield to the plaintiff's table.

The Court: Maybe that is the lucky seat. Very well, Mr. Davis, you make make your opening statement.

Mr. Davis: If the court please and Mr. Kay. As the Court has indicated, the pleadings will show that the only serious dispute before the Court at this time is the settlement of property rights. Inasmuch as both of the parties claim incompatibility and

the parties have separated over a year ago, haven't lived together since as husband and wife, of course, each of the parties are claiming that the other one is the party at fault in connection with the incompatibility, but I intend in this matter to put on proof of a general nature which I believe will establish the incompatibility between the parties. As far as property rights are concerned here and for the Court's information, the parties I believe have honestly tried over a period of several months last past to reach an agreeable settlement, which they have come fairly close to on several occasions, but they haven't been able to reach a final settlement that they both agree on, and accordingly, it is going to be necessary for the Court here to determine what the property is, where it is and what is going going to be done with it. In that connection I want to call the Court's attention to the fact that a considerable portion of the property consists of a going business, something that probably cannot be divided without serious detriment to both parties. The problem is going to be that one or the other party get the business as such. The property also consists of several pieces of real property including some business property and the family home. I will show that back in the month of May I asked Mr. Gene Silberer, of Norene Realtors, to appraise the major portion of [5] the property and I don't believe that there is any serious dispute between the parties as to the value that Mr. Silberer has set on the various items of real property with the exception of the family home. Mrs. Paddock has accepted

the filing of Mr. Silberer as to the value of the home and Mr. Paddock has thought it was worth more than what Mr. Silberer said it was. I also have the Profit and Loss Statement and Balance Sheet of this business as of the end of December of last year, prepared by Mr. Godchaux the accountant, and I think that Mr. Godchaux is actually in better position here to determine what the interest of the parties is in that business than anybody else because he has been, for several years, keeping the books or checking income tax. I would like to point out to the Court, that under order of this Court, although the parties have conducted that business as a partnership for many many years last past that Mrs. Paddock has been excluded from even setting foot on the premises and that injunction by consent is still in full force and effect. We object to the temporary order that the court made. Because of the fact that there is so much animosity between the parties there wasn't any use in trying to aggravate it by having her go down there, but along with everything else now we are going to have to ask the Court for some money for Mrs. Paddock, both as a basis of money now and so much money a month until this matter is finally settled. Now, for what it may be worth, it is my suggestion that Mr. Godchaux not make any final determination as far as the business [6] is concerned until after the close of this here business. That is only ten days or some such matter away, but it seems to me that we are close enough to the end of the year so that we should reflect what the business is as of that

time. It also would be my suggestion that if the Court sees fit to grant a divorce here that we might as well go ahead and finish up that phase of it, as far as the divorce is concerned, and allow then the matter of property to be settled as soon as possible, as soon as Mr. Godechaux can make his report.

The Court: Very well, Mr. Kay.

Mr. Kay: May it please the Court and Mr. Davis. I agree very largely with the statement of issues and remarks made by Mr. Davis, however, there are several points of considerable difference between us. Mr. Davis has consistently taken the position, which he stated in his opening remarks, that this business has been conducted as a partnership for many years. We believe the evidence will show that the business has never been conducted as a partnership, has never been a partnership and is not now a partnership. I really have been at a loss, since I came into this case which was only a month or two ago, to figure out why Mr. Davis thinks this is a partnership. Now, this morning I am going to be educated on that because he has announced that he is going to prove that. We will show Your Honor that efforts have been made throughout the year to settle the case as of the close of business 1952 and that has been the chief point where [7] the parties have both drawn, whether or not to take into consideration in making the settlement the amount of money which Mrs. Paddock has drawn this year while they have been separated—an amount which we will show is in the vicinity of \$15,000 or \$16,000. We believe that, of

course, a fair settlement must be made of the property, but we do not agree that the business is or has been a partnership. We will show that the property has been and is now in Mr. Paddock's name. He owned the business when they were married and has continued it throughout as Paddock's Paint and Furniture Store. Mrs. Paddock came to work for him, as a matter of fact, as a young widow with two children back in 1936, somewhere along there, and after a year or so as an employee they were married and have lived together since. I believe with that statement we are ready to go.

The Court: Very well, the Court will inquire of counsel, in order to get at a basic starting point, do you, Mr. Kay, consider the appraisal of Mr. Gene Silberer, which was made last May, an appraisal that could be used at this time as to value?

Mr. Kay: Your Honor, except as what Mr. Davis stated—as to the house which we feel Mr. Silberer appraised too low. He appraised it at \$18,000 and Mr. Paddock feels it is actually worth in the neighborhood of \$25,000. We feel that Mr. Silberer's appraisal was correct as of last May. Now, I feel personally, and I don't have anything to back it up, but I feel there has been some decline in value in the Anchorage area during the year. [8]

The Court: Well, that is why the court raised the point.

Mr. Kay: But we are perfectly willing to accept those figures except as to the house, as a fair appraisal of the property made last May. I understand Mr. Silberer was going to be here, called as a

witness, so we would have an opportunity probably to ask him whether his opinion has changed since that time.

The Court: Now, I asked counsel to get Mr. Godchaux here this morning. Did counsel endeavor to do that?

Mr. Davis: I was not able personally to talk to him. I left word for him to call.

The Court: Here he is now.

Mr. Davis: I wonder at this time if we might agree on some exhibits here as a matter of getting the thing moving, to put in the Norene Appraisal and put in a list of the tax valuations of this property as of last year.

The Court: Mr. Kay.

Mr. Kay: No objection.

The Court: Seems like a good point to start from as far as the Court is concerned.

Mr. Davis: I would like to offer then at this time Plaintiff's proposed Exhibit No. 1, which is an appraisal made by Mr. Gene Silberer on May 9, 1953, which concerns the Paddock Paint Store property and Sunshine Market property and the home.

The Court: Very well, and it is understood that Mr. Kay [9] doesn't concur as to the appraisal of the home only.

Mr. Kay: That is right. I wonder if it wouldn't be a good idea to mark in the margin the name of the property concerned so the Court wouldn't have to figure out which is which.

Mr. Davis: Very well. This first piece here is Paddock's Paint Store property. Now, the second two together comprise the Sunshine Market property—the east half and the west half and the last one is the family home. Now, I would like to offer as Plaintiff's proposed Exhibit No. 2——

The Clerk: This is to be admitted? (Referring to Plaintiff's Exhibit No. 1.)

The Court: Yes, that is as qualified by attorney for the defendant.

(The document above referred to, was thereupon received in evidence as Plaintiff's Exhibit No. 1.)

Mr. Davis: Well, I presume the exhibit itself is qualified, but it is understood Mr. Kay does not agree on one piece of property.

The Court: That is right.

Mr. Davis: Proposed Exhibit No. 2 is a list of the tax valuations for the City Taxes.

The Court: What date is that?

Mr. Davis: As to the same pieces of property. That is for the year 1952-53, as of October '52. Now, since Mr. Godchaux has come in I wonder if it might not be wise for the [10] Court to go back and review a little bit what was done so he won't have to stay. I don't suppose there is any good reason why he should waste his morning here.

The Court: The Court was going to do that, but doesn't he need the exhibits for the accounting?

Mr. Davis: Well, I don't think so, unless—(Mr. Davis confers with Mr. Godchaux)—I would then

offer a proposed Exhibit No. 3. I think you have this one, Wendell, as to the financial statement of Paddock Paint and Furniture Store as of December 31, 1952, signed by Mr. Godchaux, which he says is a statement that he made.

The Court: Well, of course, that shows the valuation and Profit and Loss as of that time. Naturally, we expect him to bring it up current in addition thereto.

Mr. Kay: We have one as of the 30th day of November, 1953, of course, he will later, as Master, bring it completely up to date.

The Court: That is right. I think this would certainly be advantageous to the Court. So if there is no objection——

Mr. Kay: No objection.

The Court: Let the record show then that Exhibits 1, 2 and 3, as explained by counsel, and without objection, excepting to the one qualification of one, are admitted in evidence.

(The documents above referred to, was thereupon received in evidence as Plaintiff's Exhibits 2 and 3.) [11]

The Court: Mr. Godchaux, the Court will just advise you from the bench that upon stipulation of counsel for both the plaintiff and defendant they desire to have you appointed as Master in this case and the Court would like to have you, in this capacity, make a full accounting, and, Mr. Kay, you didn't object thereto so it will be as of 31 December 1953, is that correct?

Mr. Kay: Yes.

The Court: And after that has been done, which the Court hopes you can do at a fairly early date and submit the same to the Court. Now, in this respect the Court hasn't checked that—I wonder if Mr. Godchaux should not take an oath before he is an officer of the court in this respect and, therefore, it would appear to the court that the proper things to do and rather than to have it orally administered by the Clerk, the Court thinks now that it might be advisable to have it reduced to writing, there being no bond in this case because it is on stipulation of counsel. So, therefore, the court will prepare an oath for you to sign if you will come by sometime—are you willing to accept this responsibility?

Mr. Godchaux: Yes.

Mr. Davis: I presume now in view of the action we have taken here that Mr. Godchaux is not going to personally hear any evidence, at least at this time. He is going to work over the matter of accounting and present a report to the court on that account? [12]

The Court: That would be the desire of the Court because Mr. Godchaux is like the Court, endeavoring to be neutral, however, some testimony may have a tendency to bias, so therefore the Court feels Mr. Godchaux should be excused. Thank you for coming and could you come by the Court's office tomorrow for signing the oath. Very well, plaintiff may call the first witness.

Mr. Davis: Call Mrs. Paddock.

FLORENCE PADDOCK

called as a witness on behalf of the plaintiff, and being first duly sworn, testified as follows on

Direct Examination

By Mr. Davis:

Q. Will you state your name, please?

A. Florence Paddock.

Q. Where do you live?

A. 226 East 7th.

Q. Anchorage, Alaska? A. Yes.

Q. Now, how long have you been a resident of the Territory of Alaska? A. Since 1935.

Q. And has that been continuous residence?

A. Yes.

Q. You are the plaintiff in this action, are you not? A. Yes. [13]

Q. And you are the wife of Harold Paddock, the defendant? A. Yes.

Q. When were you and Mr. Paddock married?

A. In 1938.

Q. Give us the month and the day, please?

A. January 14.

Q. 1938? A. Yes.

Q. Where were you married?

A. Wasilla.

Q. Now, have any children been born the issue of this marriage? A. No.

Q. Do you have children by a previous marriage? A. Yes.

Q. How old were they when you married Mr. Paddock? A. They were three and four.

(Testimony of Florence Paddock.)

Q. And were those children then brought up in the home of you and Mr. Paddock?

A. Yes.

Q. And did they go by the name of Paddock?

A. Yes.

Q. Generally, then, were they acknowledged by Mr. Paddock as being his children? A. Yes.

Q. All right, where are the children now? [14]

A. Well, they are going to school in the states.

Q. Have you and Mr. Paddock acquired certain property since your marriage? A. Yes.

Q. I will go into that more fully at a later point. In your complaint, Mrs. Paddock, you have alleged there is an incompatibility of temperament that exists between you and Mr. Paddock which makes it impossible for you to continue living together as husband and wife. Will you tell the court in a general way what that incompatibility consists of?

A. It just got to the point where we couldn't agree on anything. It got to the point where Mr. Paddock would go off and wouldn't come home and so in October he just left.

Q. October of what year?

A. 1952.

Q. And have you lived together at all as husband and wife since October 1952?

A. No.

Q. Where have you been living during that period of time?

A. In the home residence.

Q. And where is that located?

(Testimony of Florence Paddock.)

A. 226 East 7th.

Q. And do you know where Mr. Paddock has been living?

A. Well, he has been living in an apartment over the store—McNally Apartments. [15]

Q. When you say "over the store" is that over the Paddock Paint and Furniture Store?

A. Yes.

Q. That is located on Fourth Avenue?

A. Yes.

Q. Mrs. Paddock, you know your situation better than anybody else, except Mr. Paddock, do you believe there is any possibility that you and Mr. Paddock can ever be happy any more as husband and wife? A. No.

Q. Now you lived together since 1938, is that right, up until 1952? A. Yes.

Q. Has this trouble between you been growing for a number of years last past before the final breakup?

A. Yes, for about the last five years it has been getting worse.

Q. Is it your testimony that you do not believe the two of you can ever be happy again as husband and wife? A. No.

Q. Do you believe, Mrs. Paddock, that you did what you could to make this marriage last?

A. Yes.

Q. You think there is anything at all that you could do so that the thing could be patched up to where the two of you could be happy? [16]

(Testimony of Florence Paddock.)

A. No.

Q. All right, at the time you were married, Mrs. Paddock——

The Court: Mr. Davis, the Court feels that Mrs. Paddock, as she has alleged in her grounds for divorce hasn't been specific enough if you expect her to get it.

Q. (By Mr. Davis): All right, just what is the difficulty between you and Mr. Paddock—as a matter of fact, Your Honor, they haven't lived together for over a year.

The Court: That is right, but in this instance they are both asking for the divorce and the general statement of proof which is evidence so far is certainly not sufficient to warrant the Court—why aren't they living together? What motivated the problem to the point of where it is at the present time and no proof has been put on as to that.

Q. (Mr. Mrs. Davis): Mrs. Paddock, you said that you and Mr. Paddock didn't get along. Now, what were the specific causes that made it impossible for you to get along?

A. Well—I mean, wouldn't just disagreements and temperaments not the same, things like that—I mean, you get to the point where it is even bad for your health—I mean, mentally and physically.

Q. What did you disagree about?

A. Well, he would go off weekends and never come home. I never [17] knew where he was at.

Q. Over how long a period of time did that last before you finally separated?

(Testimony of Florence Paddock.)

A. Oh, four or five months.

Q. And prior to that time you said that you had not been getting along for a period of four or five years? A. Yes.

Q. Now, had you had quarrels between the two of you? A. Yes.

Q. What precipitated those quarrels? What started them off?

A. Oh, running of the business and things like that.

Q. As a matter of fact, did Mr. Paddock like to go places where you liked to go?

A. Well, it got to the point where neither one of us could go any place. Neither one of us were agreeable on that.

Q. How did you spend your evenings? What did you do after the day's work was over?

A. I stayed home and I don't know what he did.

Q. You mean he left home? A. Yes.

Q. Did that go on for quite a long period of time? A. Yes.

Q. Did that lead to quarrels between you?

A. Well, yes.

Q. How did that come about? Did you ask him where he had been? [18]

A. No, I figured that was his own business.

Q. What caused the quarrels then? The fighting between the two of you?

A. Well, just like I said, it got to the point he was never home and we couldn't agree on anything ever.

(Testimony of Florence Paddock.)

Q. Did you talk to him about why he wasn't home? A. Yes.

Q. What did he say?

A. That is what he said—our quarreling and everything, that he just rather be out.

Q. And when he finally left home did he say anything as to whether or not he was going to continue to live with you or whether he wasn't?

A. No, he just left home.

Q. And set up his own apartment?

A. Yes.

Q. That, you say, was in October 1952?

A. Yes.

Q. Have you tried since that time to get him to come back home? A. No.

Q. Has he made any attempts to say, "Well, let's come on back and go to living together"?

A. No.

Q. In your own mind do you feel that the matter is hopeless as far as trying to live together with him? [19] A. Yes, that is right.

Mr. Davis: Your Honor, I think that about covers the grounds as thoroughly as I can cover it.

Mr. Kay: I certainly agree with Mr. Davis the word "incompatibility" means people can't get along and—

The Court: The Court doesn't want to take argument at this time, Mr. Kay, you will have your turn.

Q. (By Mr. Davis): Mrs. Paddock, when you

(Testimony of Florence Paddock.)

were married to Mr. Paddock was he running a business at that time? A. Yes.

Q. What was the business? What kind of business was it?

A. Well, paint contracting and a little paint store.

Q. And where was the paint store located?

A. Well, at the time we were married it was located on Fourth Avenue.

Q. And was that this property that is now known as the Sunshine Market? A. Yes.

Q. Now, at the time you were married was Mr. Paddock in the process of purchasing that property? A. Yes.

Q. You know of your own knowledge how much the total purchase price was?

A. No, I don't. [20]

Q. Do you know of your own knowledge as to what had been paid at the time that you were married?

A. No, I know that we were paying payments on it but I never——

Q. Can you tell me how much the payments were you were making, a month?

A. I believe it was \$50.00.

Q. And did those payments then continue for a considerable period after you were married?

A. Well, it seems to me like they did.

Q. All right, that property then, was that the property that we have called the Sunshine Market property? A. Yes.

(Testimony of Florence Paddock.)

Q. Now, in 1939, Mrs. Paddock, Anchorage was relatively small town, was it not? A. Yes.

Q. Do you remember about what the population was?

A. Oh, no, I don't. I imagine around, oh, 12 or 15 hundred people.

Q. Might have been as much as three thousand?

A. Well, it could have been, I have no idea. It was small.

Q. How many paint stores were there in Anchorage at that time?

A. Well, I believe there were about two paint stores.

Q. And then the various hardware stores also sold paints, did they not? A. Yes.

Q. Mr. Paddock, you say, was a painting contractor? [21] A. Yes.

Q. He actually went out and did painting himself at that time, did he not? A. Yes.

Q. And also hired men to help him?

A. That is right.

Q. Now, during—after your marriage did you work in that store, Mrs. Paddock? A. Yes.

Q. And during the time when Harold was out painting did you actually run the store?

A. Yes, I was there.

Q. Then following that when was it that you bought the old McNally property — the property that we now call the Paddock store property or the Paddock Paint and Furniture Store property?

(Testimony of Florence Paddock.)

A. Well, I don't exactly remember. It was about 1941 or '42, I believe.

Q. Now, you bought that I believe from Mr. McNally, did you not? A. Yes.

Q. Do you remember the purchase price of that property at that time?

A. I believe it was \$20,000.00.

Q. And do you know how much was paid down?

A. I have forgotten. [22]

Q. Did you likewise pay that property out at so much a month? A. Yes.

Q. And is the property paid for?

A. Yes.

Q. During the — after your marriage did you and Mr. Paddock maintain a joint banking account? A. Yes.

Q. And was that bank account the business account? A. Yes.

Q. Was there ever any other account except the business account?

A. No, no personal account, no.

Q. And as you took in money in the store or as money was taken for the contracting it went into that account, is that right?

A. That is right.

Q. And as money was paid out for living expenses and other expenses came out of it?

A. That is right.

Q. And that account has continued through the years up to the present time, has it? A. Yes.

Q. All right, did it become necessary over the

(Testimony of Florence Paddock.)

period of years to borrow some money in connection with these various businesses? A. Yes.

Q. And in borrowing money did you personally sign the notes and [23] mortgages?

A. Well, some of them I did.

Q. And I believe you signed one as late as this summer after you and Mr. Paddock had separated, did you not? A. Yes.

Q. That is the mortgage for \$22,000.00?

A. Yes.

Q. All right, in connection with income tax, have you folks filed joint income tax returns over the years? A. Yes.

Q. As to all the business known as Paddock Paint and later Paddock Paint and Furniture?

A. Yes.

Q. Now, the property that is now known as the Sunshine Market actually stands in Mr. Paddock's name, does it not? A. Yes.

Q. And the property that is known as the Paddock Paint and Furniture Store likewise stands in his name, does it not? A. Yes.

Q. How about the family home, does that stand in both names?

A. No, that is in his name.

Q. All right, did you actually—Mrs. Paddock, did you and Mr. Paddock actually conduct this business over all these years as partners?

Mr. Kay: I object as leading and calls for conclusion of [24] the witness.

The Court: Objection sustained.

(Testimony of Florence Paddock.)

Mr. Davis: As being leading or calling for conclusion?

The Court: Both. I am not sure that the witness knows what a partnership is.

Q. (By Mr. Davis): Mrs. Paddock, do you know what a partnership is?

A. Well, I figure if two people have worked in business long enough even if—like the income tax, it was written down as a partnership.

Q. Did you file, as a matter of fact, partnership income tax returns? A. Yes.

Q. Over periods of many years last past?

A. Yes, Mr. Godchaux has all of those.

Q. All right. Now, in the course of your marriage to Mr. Paddock, in addition to the two pieces of property that we have mentioned, did you then acquire the home property?

A. Yes.

Q. Where the family home is? A. Yes.

Q. Do you remember what was paid for that property?

A. Well, I believe for the property and for the lot and the building it was \$900.00.

Q. And when was that property acquired? [25]

A. Well, I don't exactly remember. I believe—we have had it eight or nine years, something like that, nine or ten years, so it would be around '43 I imagine.

Q. Was the property considerably fixed up and improved after it was purchased?

A. Yes, the house was fixed up.

(Testimony of Florence Paddock.)

Q. And have you any idea how much is presently in that house from you and Mr. Paddock? How much you put into it outside of the purchase price? A. Well, no I don't.

Q. Have you been living in that place as the family home since the time you bought it?

A. Yes.

Q. And Mr. Paddock lived there too, did he, up until the time he moved out as you testified?

A. Yes.

Q. All right, that property is the property we have marked on the exhibit here as being the family home property, is that right?

A. Yes.

Q. Now, then did you later buy a piece of property next door to that family home property?

A. Yes.

Q. And what did that property consist of?

A. Well, little furnished house. [26]

Q. Small house on a lot, is it? A. Yes.

Q. Full sized lot? A. Yes.

Q. Now, was that property in your name or Mr. Paddock's or both names?

A. I just put it in my name.

Q. All right. How was the down payment made for that property?

A. Well, it was taken out of the, you know, business.

Q. And have the payments—has the rent from that little house presently, generally carried the payments on that lot? A. Yes.

(Testimony of Florence Paddock.)

Q. Have there been some instances in which the rent has not taken care of the payments?

A. Yes, it was vacant for a couple of months that I had to pay them out of what Mr. Paddock gave me.

Q. Was that within the last few months?

A. Yes.

Q. Do you remember how much the purchase price of that property was?

A. It was \$7,500.00.

Q. Do you know how much has been paid on the account of that contract?

A. Well, it is a little over \$5,000.00 balance.

Q. I believe that Mr. Godchaux has that property as well as all [27] the other property carried on the books of the business here?

A. Yes.

Q. All right. Now then, in the course of the business did the partnership or the business acquire certain property out at Spenard? A. Yes.

Q. And I believe that that property is shown on Mr. Godchaux's statement as well, is it not?

A. It is.

Q. And that property is being purchased on contract? A. Yes.

Q. And I believe the statement shows the balance that is presently due, or was due at the end of last year on that particular contract, is that correct? A. I believe it is, yes.

The Court: Mr. Davis, I didn't understand that.

(Testimony of Florence Paddock.)

Mr. Davis: I said the statement shows a balance due as of December 31, last year.

The Court: Thank you.

Q. (By Mr. Davis): Mrs. Paddock, is the family home mortgaged or do you know?

A. No, as far as I know it isn't.

Q. The family home then, according to your testimony, is clear? A. Yes.

Q. Are the other properties—the Sunshine property or Sunshine [28] Market property and Paddock Store mortgaged? A. Yes.

Q. Do you know the total amount of those mortgages?

A. No, I don't. I believe it is around, all together around \$30,000—\$28,000 or \$26,000.

Q. And you have testified that the property next door to the family home is being purchased on contract? A. Yes.

Q. With a balance due of some \$5,000.00?

A. Yes.

Q. And the property out in Spenard likewise is being purchased on contract? A. Yes.

Q. Now, then was certain property acquired out in Mt. View? A. Yes.

Q. Do you know what that property consists of?

A. A lot.

Q. And is there a warehouse building or some kind of building on there? A. Yes.

Q. Used for storage in connection with the business? A. Yes.

(Testimony of Florence Paddock.)

Q. And was certain property acquired down in the Anchor River area or Homer area?

A. Yes. [29]

Q. Do you know what that property consists of?

A. Well, it is a recreation site, they call it.

Q. And that was purchased fairly recently, was it not?

A. Yes.

Q. Is there any improvement on that property?

A. Well, there was—no, there wasn't.

Q. Has there been some improvement since you and Mr. Paddock separated, do you know?

A. As far as I know there hasn't.

Q. All right, during the course of your marriage, I will ask, an automobile was purchased?

A. Yes.

Q. And was that purchased out of the common funds, this business account that we have been talking about?

A. Yes.

Q. And whose name was that car put in?

A. Mine.

Q. I will ask as to whether or not you before that—strike that—was that car carried as part of the assets of the business known as Paddock Paint and Furniture?

A. Yes.

Q. And the various expenses in connection with the car, were they defrayed through the business as well?

A. Yes.

Q. How about the utility bills and the oil bills and other expenses [30] of the family home, was that handled as part of the business of Paddock Paint and Furniture Store?

A. Yes.

(Testimony of Florence Paddock.)

Q. All right, going back to the automobile, Mrs. Paddock, did you trade that automobile in within the last six months? A. Yes.

Q. And bought a new car with it?

A. Yes.

Q. What kind of a car was it that you traded in? A. It was a Packard.

Q. And what model?

A. It was a 1952.

Q. 1952 Packard? A. Yes.

Q. Was it a sedan? A. Yes.

Q. How much did you get on the automobile on the trade-in? A. \$2,800.00.

Q. And how much did the new automobile cost?

A. It cost around \$4,300.00.

Q. Now, are you purchasing that new automobile then on contract? A. Yes.

Q. How much a month do you pay on that automobile? A. \$107.00.

Q. And what is that—12 months contract? [31]

A. Yes.

Q. When was the automobile purchased?

A. It was in April.

Q. Of this year? A. Yes.

Q. Then the automobile will be fully paid up then at the end of March of this coming year, is that your testimony? A. Yes.

Q. All right. I will ask as to whether or not the paint business that you testified to, later became a paint and furniture business? A. Yes.

Q. When was that change made?

(Testimony of Florence Paddock.)

A. Well, approximately — changed in around 1946 I believe. I don't know exactly—'45, I don't recall the exact date.

Q. And is the furniture end now the major portion of the business?

A. Well, they are both about the same.

Q. Is there much general contracting being done by Mr. Paddock in recent years?

A. No.

Q. So the paint business now is limited to the sale of paints and paint supplies, is that right?

A. Yes, that is right.

Q. All right, Mrs. Paddock, since your separation from Mr. Paddock how has the financial end of your living been handled? [32]

A. Well, Mr. Paddock has been paying me so much a month.

Q. Now, did he until recently continue to pay the fuel bill and the other bills in connection with the house, through the store? A. Yes.

Q. And how much was he giving you a month for your living expenses at the time that you separated?

A. Well, at the time I separated I worked up until March and then it was from, oh, I would say about, I believe it was June that he started making—you know, giving me payments.

Q. Just a minute. You worked up until March of what year? A. 1953.

Q. When you say "worked" you mean you worked in the store?

(Testimony of Florence Paddock.)

A. Yes, he was outside from January until March.

Q. And you continued then to work in the store as you had done in the past until March of this year, is that right? A. Yes.

Q. All right, how much then—strike that question—why was it that you quit working in the store?

A. Well, we decided it was best and he said that we couldn't work there together so then, that is why I left.

Q. And when was that?

A. At the end of March.

Q. Now, from time to time during the course of the spring and summer of 1953 have you been going back to the store? [33]

A. Not very often.

Q. And I will ask as to whether or not you went back on some occasion about the month of July—remember that occasion? A. No.

Q. Well, did you and Mr. Paddock get into some kind of argument on one occasion when you went back to the store?

A. You mean—I don't quite understand what you mean.

Q. Did you have an argument about whether or not you should come on the store premises along about July of 1953? A. No.

Q. Well, did you ever have such an argument?

A. Yes.

Q. When was that?

(Testimony of Florence Paddock.)

A. Well, it was in November.

Q. All right, I will ask if on one occasion Mr. Paddock forcibly put you off the premises?

A. Well, yes, out of the office.

Q. When was that?

A. Well, I guess that was in July, approximately.

Q. All right, going back then to the time that Mr. Paddock left home how much did he give you toward operation of the family home expenses?

A. Well, he started—he gave me a \$1,000.00 or started out with \$1,000.00.

Q. And was that \$1,000.00 a month?

A. Well, one month.

Q. That is the first month then is it? A. Yes.

Q. And what payment was made after that?

A. Well, I believe around \$600.00 and then \$500.00 and then he started taking out the expenses on the checks.

Q. When you say that he paid \$1,000.00, the first month, was that over and above the expenses of operation of the house, the fuel, lights and the repairs, that sort of thing? A. Yes.

Q. And when he paid \$600.00 how long did that \$600.00 continue?

A. Well, I think I got \$600.00 one month and then I got \$500.00 and after that then he started taking out the expenses.

Q. How much did he pay you during the month of November? A. Well, he paid me \$400.00.

Q. How much did he pay you during the month

(Testimony of Florence Paddock.)

of December? A. Well, he gave me \$200.00.

Q. All right, how much, if you know, have you received all together in 1953?

A. You mean that he has paid me or I have drawn?

Q. Well, what he paid you and how much you have drawn from the business account during 1953? The total? A. Well, I don't know exactly.

Q. Now, Mr. Kay mentioned a figure here of about \$16,000.00, is that relatively right? [35]

A. Well, that is—he seemed to put down every little item from January on so I suppose, because I haven't looked at the books.

Q. At any rate the books do reflect what you have taken from the business, do they not?

A. Yes.

Q. All right, how much does it cost, Mrs. Paddock, to keep the girls in school?

A. I imagine it is around \$350.00.

Q. Per month? A. Yes.

Q. Does that include travel expenses back and forth? A. No, not for both.

Q. Where are the children in school?

A. Well, the oldest one goes to school in Portland and the youngest in Centralia.

Q. How much does it cost for eating for you, Mrs. Paddock?

A. Oh, about \$100.00 a month.

Q. How much does it cost for your clothes?

A. Well, for my clothes it costs around, oh, \$150.00, \$200.00.

(Testimony of Florence Paddock.)

Q. Now, you have had the right to draw checks on this joint account for many years last past, have you not? A. Yes.

Q. Do you still have that right? A. No.

Q. When was that cut off? [36]

A. I believe it was cut off in June.

Q. Of this year?

A. Yes, May or June.

Q. And did Mr. Paddock advertise in the papers against any of the stores granting you credit?

A. No, but he called them up.

Q. Called up the various stores where you had been dealing? A. Yes.

Q. And did that make it difficult for you to get credit?

A. Well, after they told me about it I didn't try to get credit.

Q. All right, how much do you feel it takes a month for you to get along, keeping in mind that you—that Mr. Paddock is now requiring you to pay the oil bill, light bill, and the fact that you have got the daughters to take care of and the car payment, what does it take a month for you to get along? A. Well, around \$750.00.

Q. As a matter of fact in these months now when you haven't been getting \$750.00 have you gone behind? A. Well, I am behind, yes.

Q. Do you now owe certain bills?

A. Yes.

Q. How much do you owe?

A. Oh, I imagine around \$2,000.00.

(Testimony of Florence Paddock.)

Q. Do you owe tuition for the girls schools?

A. Yes.

Q. Have you incurred certain bills here and there in connection with the household?

A. Well, light bill, yes.

Q. Is the light bill presently unpaid?

A. Yes.

Q. When should it have been paid?

A. Well, it should have been paid, oh, around the 14th or 17th, when I generally get at it.

Q. Of December? A. Yes.

Q. How about the fuel bill, has that been paid as far as you know? A. Yes.

Q. You said Mr. Paddock deducted that from the check he sent to you? A. Yes.

Q. How much have you paid on the account of your attorney's fees and costs of this action?

A. \$150.00.

Q. Is there any other property, Mrs. Paddock, any other real property over and above what we have mentioned here?

A. Not that I know of. Not to my knowledge.

Q. Now, there is a stock in trade in connection with the furniture and paint store, is there not?

A. Yes. [38]

Q. Now, all of the property including the stock in trade and the real property is reflected in the books of the Paddock Paint Company, is it not?

A. Yes.

Q. However, the value set up in the books—the value of the various properties was set prior to the

(Testimony of Florence Paddock.)

time that Mr. Silberer made this appraisal was it?

A. Yes.

Q. Do you have any knowledge of what the books show the value of these particular properties to be?

A. No, it is approximately, though, what you have there.

Q. Approximately the same? A. Yes.

Q. Do you mean it is approximately the same as Mr. Silberer's appraisal? A. Yes.

Q. All right, is there anything else then, Mrs. Paddock at this time that you want to give testimony concerning this matter, either the matter of the grounds for divorce or the matter of property between you and Mr. Paddock?

A. Nothing that I can think of right now.

Q. That is all at this time. Mr. Kay will want to cross-examine you.

The Court: The Court will stand recessed for ten minutes.

Recessed 11:10 o'clock a.m. [39] Reconvened

11:23 o'clock a.m.

The Court: Mr. Kay, you may cross-examine.

Mr. Kay: Thank you, Your Honor.

FLORENCE PADDOCK

testifies as follows on

Cross Examination

By Mr. Kay:

Q. Mrs. Paddock, you came to Anchorage about 1936, did you not? A. It was in 1935.

(Testimony of Florence Paddock.)

Q. 1935. You went to work for Mr. Paddock in the store in 1936, I believe?

A. Yes, I imagine.

Q. And what was the nature of your work at the time you first went to work for Mr. Paddock?

A. Well, sort of taking care of the store and answering phones while he was out.

Q. Did Mr. Paddock have any other employees besides yourself at that time?

A. No, he had a partner.

Q. He was already in partnership at the time, was he not? A. Yes.

Q. Do you remember the name of the fellow with whom he was with in the painting contracting business? A. Mr. McNally.

Q. He later bought out Mr. McNally's interest in the business? [40] A. Yes, sir.

Q. What salary were you drawing back in those days?

A. Well, being like—say, just answering phones and selling what little paint there was to sell at the time, oh, approximately \$40.00 a month.

Q. Quite a bit of difference between Anchorage salaries in those days and now? A. Yes.

Q. And you continued to work then in the store until you and Mr. Paddock were married in 1938, January 1938? A. Yes.

Q. And then you continued to work after the marriage down through the years, did you not?

A. Yes.

Q. That work was more or less of your own

(Testimony of Florence Paddock.)

choice, was it not, Mrs. Paddock? You liked the opportunity to come down town to be in the store and work?

A. Not necessarily. I wanted to help and being it was slow those times it would help out in the business too.

Q. And so you continued that helping in the business on a more or less sometimes regular and sometimes irregular basis?

A. No, it was regular.

Q. Well, it wasn't daily, was it? A. Yes.

Q. Every day since 1938? [41] A. Yes.

Q. That you have been at the store?

A. Yes.

Q. What were your hours?

A. Well, I go to work at nine and leave at six.

Q. Well, now is that not your testimony that you were there every day from nine to six, is it, Mrs. Paddock?

A. Well, sure, there had to be somebody there.

Q. Well, there were other employees as the store expanded?

A. Well, yes in later years we had other employees.

Q. As a matter of fact, from about 1942 on there have been other employees have there not?

A. Yes.

Q. And isn't it a matter of fact that you frequently would not come down until 10:30 or 11:00 o'clock?

(Testimony of Florence Paddock.)

A. I always showed up unless Mr. Paddock was there.

Q. Well, if Mr. Paddock was there you didn't feel the same necessity for getting down there?

A. No, but I generally got down in the morning because lots of times he wouldn't be around there and somebody had to be there.

Q. Now, when did you first get on the bank account? When were you first authorized to draw checks on the business, if you recall?

A. Well, right after we were married.

Q. Up until that time you had not had the authority to write checks on the firm account? [42]

A. No, because I was only an employee.

Q. And there have been two bank accounts, have there not? A. Yes.

Q. And for a long period of time you generally, more or less handled the books of the business, did you not?

A. Yes, only at the end of the year an accountant took care of them.

Q. And in the course of that work you would necessarily sign checks paying the current bills?

A. That is right.

Q. Some of those checks you signed Florence Paddock and many of them you signed H. D. Paddock and you could sign either name and the bank would clear either name that you wrote on either account? A. That is right, yes.

Q. Now, you continued to be carried on the

(Testimony of Florence Paddock.)

books of the firm as an employee down until about 1948 or '49, did you not? A. No.

Q. Are you sure of that, Mrs. Paddock? Have you ever examined the books of those previous years to see how you were carried?

A. No, I haven't.

Q. Well, you stated in answer to a question by Mr. Davis that you had filed, you and Mr. Paddock had filed partnership returns, is that correct?

A. That is correct, yes, on the income tax. [43]

Q. Now, are you sure or aware of the difference between a joint tax return filed by husband and wife and a full partnership tax return, Mrs. Paddock?

A. I mean, Mr. Godchaux has all of those—I mean, it is right down there. I took it for granted it was a partnership.

Q. Well, then you don't know whether or not the firm filed actual partnership tax returns or not, do you? A. Well, I believe they did.

Q. But do you know?

A. Well, no unless I look at it again. I can't say positively that they did.

Q. Were you aware of the fact that in about 1947 or '48 or around in there it became advantageous for husband and wife to file joint tax returns from the point of view of submitting income?

A. Well, yes, Mr. Godchaux—if it was under joint return—like I say I can't—

Q. That is the time when you and Mr. Paddock first began to file joint tax returns, is it not?

(Testimony of Florence Paddock.)

A. Well, somewhere in there, yes.

Q. And that was because of this advantage which had been given to us by Congress permitting husband and wife to submit income? A. Yes.

Q. You and Mr. Paddock ever have a written partnership agreement of any kind?

A. No, I didn't figure it was necessary. [44]

Q. Did you ever have an oral partnership agreement? Did Mr. Paddock and you ever say so in so many words?

The Court: You asked two questions.

A. I mean after we had been married so long you just don't ask your husband that you should have a partnership, you don't dream of it.

Q. In other words, then the answer is that you and Mr. Paddock have never had either a written or oral partnership agreement of any kind?

A. No, that is right.

Q. And during all these years you have had either one or two bank accounts?

A. Well, in the First National Bank we always deposited First National checks and the Bank of Alaska the same. I mean, that is the way Mr. McNally started it and the way we continued doing it.

Q. And those two bank accounts were either in the name of Harold D. Paddock or Paddock Paint and Furniture?

A. Well, they were under Harold D. Paddock and Florence Paddock.

Q. Now, you are sure they were under the name of Florence Paddock?

(Testimony of Florence Paddock.)

A. Well, no, the Bank of Alaska could have been. The First National Bank wasn't.

Q. As a matter of fact, both bank accounts were just H. D. Paddock or Paddock Paint and Furniture?

A. I believe—yes. [45]

Q. But you were authorized to sign checks?

A. Yes.

Q. Other employees of the firm are authorized to sign checks on those accounts, are they not?

A. No, well, generally if we went Outside or something, to the States, but otherwise they weren't.

Q. Well, as a matter of fact, there are at least two employees now and have been for several years that are authorized to sign checks?

A. Well, we went to the States one time and they were and I don't know if Mr. Paddock ever had them taken off there or not.

Q. How long ago was that? Several years ago?

A. Oh, I imagine it was a couple or three years ago.

Q. Now, you state that down during the course of the years that, you testified on direct examination, that you had signed some notes and mortgages relating to the business?

A. I believe I have.

Q. Those notes, aside from this last mortgage since you have separated, were largely relatively small loans?

A. That is right.

Q. Necessary while Mr. Paddock was Outside from time to time?

A. Well, sometimes and sometimes small notes

(Testimony of Florence Paddock.)

and mortgages—yes, they were on the property while he was here too.

Q. Mr. Paddock was able to borrow considerable sums of money at [46] either bank without your signature was he not? A. Yes, he has.

Q. As a matter of fact, he was able to borrow as much as \$20,000 in January 1947 from the Bank of Alaska without your signature, was he not?

A. Well, that would just—due to their fault, otherwise they would have had me sign before, just like they did in May.

Q. The occasions when you had to sign were usually when Mr. Paddock was Outside and would return and then they would request his signature on the note in addition to yours?

A. Not necessarily, as far as I know they didn't. I would go down and sign it. It was never too great an amount.

Q. Mr. Paddock was able to borrow \$12,000 from the First National Bank or National Bank in August '49 without your signature, was he not?

A. That is probably right.

Q. And——

The Court: Mr. Kay, the Court will point out to you that the Court considers marriage a partnership and, therefore, based upon statements of Judge Dimond and Judge Folta and experience of this Court, it is, therefore, the Court's feeling that any improvements to the contrary will be a waste of time.

Mr. Kay: Let me get the Court's thinking

(Testimony of Florence Paddock.)

straight. The mere fact that the people are partners constitutes the wife a partner in business?

The Court: No, the mere fact they are married and in this [47] case particularly where they have worked together.

Mr. Kay: Well, that is the point, if I may just express myself briefly. Certainly the mere fact that people are married doesn't constitute the wife in any sense a partner in business. My wife is not my partner, nor is your wife yours. Even if I had a grocery store, filling station or anything, if there is a partnership here in the business it depends entirely on the partnership principals and partnership laws and marriage, as far as I can see, would have no more to do with it than if they weren't married and had worked in the business under the same circumstances during the years. I feel I am legally right on that point. The Court has briefed me on the situation, on this situation, however, I don't want to prolong the testimony if Your Honor feels otherwise.

The Court: I am doing it for two reasons. One to shorten the time and the other reason is to put you on notice as to the Court's thinking on the matter.

Mr. Kay: Well, in that connection then I would like to, after the close of the evidence, submit a little memorandum on the law concerning that.

The Court: Well, the Court would rather have more than a memorandum. It will take more than a memorandum to convince the Court what you

(Testimony of Florence Paddock.)

state legally and maybe technically might be one thing, but as to the rights of the parties and divorce proceeding as set out by—— [48]

Mr. Kay: The rights of parties of divorce proceedings is just what the Court feels is right. The Court has almost complete discretion.

The Court: That is what the Court wanted to point out.

Mr. Kay: Oh, yes, no question about that. I am just going into that to point out there is no partnership in the legal sense that would not effect whatever decision the Court might make in the division of the property.

The Court: The point that appears to that court is that we are consuming time here on something that would have no bearing or wouldn't bind the court.

Mr. Kay: Well, I think if there was a business partnership, if they had agreed to become partners, either orally or in writing and deducted the business as a partnership, equal partners, then there is no sense in us being here in court. Then dissolve the partnership and each get 50 percent, but that isn't, as I understand the law, the situation at all and that is what we are here to decide as to what would be a fair and reasonable portion of the property for the Court to set aside to one or the other of these two people and what I was trying to get away from was Mr. Davis' insistence that this was a partnership.

The Court: Well, of course, I think the Court

(Testimony of Florence Paddock.)

probably has expressed his thinking on the matter, that is simply this: If there had in fact been a written partnership or if in fact there had been an agreement as an oral partnership, it would have [49] no bearing upon this case, based upon the fact she has been working most of the time unless you can prove to the contrary. That is why the Court feels out of deference to your opinion, the Court should express his opinion to you and you can guide your trial of the case accordingly.

Q. (By Mr. Kay): Well, now, Mrs. Paddock, did you have any money or properties of your own at the time you married Mr. Paddock?

A. No.

Q. You owned no real property?

A. No.

Q. Did you have any personal property to amount to anything? A. No.

Q. During the period of your marriage have you contributed in cash, anything, at any time to the business or the acquisition of the property by either one of you?

A. Well, not actually in cash. Just in time and work and my Mother kept the children for two years after we were married to help out.

Q. But to get back to the question, you haven't put in any money into the business?

A. No, not actual cash, no.

Q. Aside from the piece of property next to the home, which you bought for \$7,500.00 on which

(Testimony of Florence Paddock.)

there is a \$5,000.00 balance, do you have any property in your own name now? [50]

A. No.

Q. How about the interest in a corporation, I believe you have probably forgotten about?

A. That is dissolved.

Q. That was a corporation organized to operate a lodge at Wasilla? A. Yes.

Q. You say that corporation is now dissolved?

A. Yes.

Q. Do you consider your interest in that of any value whatever at the present time? A. No.

Q. The automobile is in your name is it not?

A. Yes.

Q. So what you have in your name now is the small house property next to the home?

A. Yes.

Q. And which you have an equity of about \$2,500.00? A. That is right.

Q. And the new Packard on which there is a balance of \$700.00 or \$800.00 left to pay?

A. Yes. The reason I put it in my name was that when he bought the other property, why, I wanted my name on the papers too and he said "no".

Q. So the other properties then are all in the name of Harold D. [51] Paddock? A. Yes.

Q. Now you stated in answer to response to a question by Mr. Davis that you believed that you needed approximately \$750.00 per month?

A. Yes.

(Testimony of Florence Paddock.)

Q. To get along, is that right? A. Yes.

Q. That would amount to about \$9,000.00 a year, would it not?

A. That is with my working too.

Q. That is in addition to what someone might earn?

A. It would cost me around, oh, \$1,000.00 a month with the girls out and everything if I didn't work myself.

Q. Did you work any during 1953?

A. Very little.

Q. So it is your testimony then that you need \$750.00 per month in addition to whatever you might earn to get along, is that right?

A. Yes.

Q. And that you feel would be in the neighborhood of \$1,000.00 a month? A. Yes.

Q. Could you break down those amounts any, Mrs. Paddock, break it down in the items you would need and so forth?

A. Well, like I say for every day living besides the actual [52] expenses of the home, keeping up the home and everything.

Q. Well, now the home is paid for is it not?

A. Yes, it is paid for.

Q. No rent, payments or anything like that?

A. No.

Q. And I believe you said that you could eat on—what was it, \$150.00 or something—

The Court: \$100.00.

Q. \$100.00 per month? A. Yes.

(Testimony of Florence Paddock.)

Q. I didn't understand what you said about clothes?

A. Well, I said around \$100.00 that would just be—well, not every month, no, but——

Q. Now, what other expenses would you have?

A. Like keeping the girls in school and their expenses, I mean, their board, tuition—runs around \$350.00 that is considering the clothes and different little things that come up at school. I mean, maybe at the time it is small amounts, but it all adds up. Some months it wouldn't run that much and some months it would.

Q. That is \$350.00 for two girls? A. Yes.

Q. Well, now what else?

A. Well, like the payments on the car.

Q. Anything else that you can think of? [53]

A. Well, there would be the ordinary—fuel—ordinary expenses.

Q. Fuel and utilities. What do utilities run out there?

A. Well, utilities—around \$35.00.

Q. And fuel runs what?

A. Oh, I imagine around, well, it varies so much, especially this year. I would say around \$75.00.

Q. Can you think of anything to add in there?

A. Well, not offhand—the taxes on the home place.

Q. You have received so far this year from Mr. Paddock in the neighborhood of, well, to be exact \$15,997.60, have you not?

A. Well, that is what he says.

(Testimony of Florence Paddock.)

Q. Through the 30th day of November 1953?

A. Well, I know what he gave me from June to November, but before that, I mean, that is what was on the books. Now the bills and things I haven't gone over them myself to see just what he counted in that.

Q. And these last several months—you testified he gave you \$400.00 in November, \$200.00 in December?

A. Yes, that is with the bills taken out.

Q. Those amounts were cash after he had paid the bills in connection with the operation of the house?

A. Yes, it was. It was \$500.00 then after he had taken out the bills——

Mr. Kay: Could I confer with my client?

(Mr. Kay confers with client.) [54]

Redirect Examination

By Mr. Davis:

Q. Mrs. Paddock, in connection with one of Mr. Kay's questions I think that you said that you had actually been carried on the payroll of the business until, say, 1946, 1947, something like that, was that your answer?

A. Well, no I don't recall being carried on the payroll.

Q. If you were?

A. I don't know what they mean by "carried on the payroll".

(Testimony of Florence Paddock.)

Q. If you were carried on the payroll was any money paid to you as an individual?

A. Well, no.

Q. And if any money was paid to you, did it go back into the bank account?

A. It went right back into the business if there was, but there wasn't.

Q. Since the time you were married have you ever drawn any wages that went to you as an individual? A. No.

Q. What does a clerk in the store over there make a month?

A. \$475.00 and \$500.00 a month. Some of them make \$475.00 and \$500.00 and I don't know what the other one makes.

Q. And has that been about the scale for several years last past? [55]

A. No, around from \$350.00 to \$400.00.

Q. Over what period, Mrs. Paddock?

A. Well, of course, they had been getting a raise, but, oh, I imagine since 1946.

Q. And when was it changed up to \$450.00 to \$500.00, if you know?

A. Well, let's see, our furniture man, when he started to work there. I believe he has been working about three years and then this last clerk, I think she started about four months ago. I don't recall they have hired them since I left—two of the clerks.

Q. What are they getting?

(Testimony of Florence Paddock.)

A. Well, one gets \$475.00 and, I don't know, the other one gets \$500.00.

Q. Now, you worked there from October last year when you separated up until probably March of this year. During that period of time were you paid any wages as wages? A. No.

Q. And if any wages were charged off to you did that go into the family bank account or the business bank account?

A. Well, it would have had there been any charged off to me.

Q. But as an individual you didn't get anything except these drawings that Mr. Kay is talking about? A. No.

Q. Over the period of years, Mrs. Paddock—in the early stages of 1939 this wasn't a very prosperous business was it? [56]

A. Well, it was slow.

Q. Wasn't much business here at that time, was there? A. That is right, no.

Q. And then the Army and Air Force moved in in 1941 and business started to expand along with all the other businesses in the area?

A. That is right.

Q. All right, during that period of time were you working in the business? A. Yes.

Q. Since you were married back in 1939 when you needed money for the operation of the house, or to go buy a new dress or something of that kind, did you just write a check on the bank account?

A. It was written off or else I would simply take

(Testimony of Florence Paddock.)

cash or just charge it to Paddock, just charge to he or I.

Q. As a matter of fact, until you separated you didn't keep any straight account between you and he? A. That is right.

Q. Anything that was drawn for either of you was drawn as common drawing account, was it not?

A. Yes.

Q. Since you have separated he apparently has set up some other system, is that right?

A. That is right.

Q. All right, can you tell us how many employees there were in that [57] business in 1942?

A. Well, I think perhaps at the start of the Army and construction we had another clerk.

Q. You are talking about in the store?

A. Yes.

Q. And then did Mr. Paddock have painters helping him on the outside? A. Yes.

Q. That painting business was largely seasonal?

A. Yes.

Q. It was mostly in the summer time?

A. Yes, but there was quite a bit in the winter. It didn't die out altogether. There was always one or two or three men working.

Q. Is it a true statement then that frequently, generally, Mr. Paddock worked outside and you worked in the store? A. That is right.

Q. And after 1942 you added another clerk?

A. Yes.

(Testimony of Florence Paddock.)

Q. And as time went on you added still more employees? A. Yes.

Q. How many have they got now in that business?

A. Well, they have three besides Mr. Paddock.

Q. Three besides Mr. Paddock. All right.

Mr. Davis: I think that is all. [58]

The Court: Any recross?

Mr. Kay: Just one or two questions.

Recross Examination

Q. (By Mr. Kay): During the years then you have drawn whatever you needed or wanted from either bank?

A. That is right, so has he. I never checked on him, I figured while he worked what he did was his own business.

Q. But the bank accounts were there and you, as his wife, was entitled to what you needed?

A. That is right.

Mr. Kay: Nothing further.

Mr. Davis: Nothing further.

The Court: You may step down.

(The witness was thereupon excused and left the stand.)

The Court: How much more time does counsel feel will be consumed in trial of the case?

Mr. Davis: As far as I am concerned I intend to call Mr. Silberer, Your Honor, at 2:00 o'clock, if I may and I have no objection at all to resting at this time and, in fact, Mr. Kay wants to examine

Mr. Silberer more than I do, so if you want to go ahead with the defendant's case it is all right with me.

The Court: Does counsel feel that you can finish up this [59] afternoon?

Mr. Kay: Oh, yes, Your Honor, our case won't take over a half hour or so.

The Court: Very well. The court will stand recessed until 1:30, but this trial will be continued until 2:00 o'clock.

Recessed 12:00 o'clock noon. Reconvened 2:08 o'clock p.m.

The Court: The Court would like to call Mrs. Paddock for two or three questions that he would like to ask before putting on Mr. Silberer. It won't take but just a moment, if you don't mind.

Mr. Davis: All right.

The Court: Then we will have continuity of her testimony.

FLORENCE PADDOCK

resumed the witness stand as a witness on behalf of the plaintiff, and having previously been sworn, testifies as follows on

Examination by the Court

Q. Do you know how much your husband was worth when you married him? A. No, I don't.

Q. What did his property consist of at that time, if you know?

A. Paddock's Paint Store where the Sunshine Market is.

(Testimony of Florence Paddock.)

Q. How large an inventory did he have at that time, if you recall?

A. Well, I can't say. He has a record some place in his books, but it wasn't too great. [60]

Q. Well, I want to know what you know about it?

A. Well, that I can't answer because it has been quite some time back and I have never checked up on it.

Q. Was it worth \$1,000.00, \$2,000.00, \$3,000.00?

A. Oh, I imagine about \$5,000.00. I can't say truthfully, but I imagine in that neighborhood.

Q. Did he have anybody working for him aside from himself at that time?

A. Well, he had painters. It was in the contract work, he worked himself and then he would hire one or two painters.

Q. But you are the only one that worked in the store, is that right? A. Yes.

Q. Do you know whether or not this property or the inventory, and, well, balance sheet which reference has been made to for the year 1952, shows a depreciated value of the property or is that in fact an inventory value? A. Well,—of 1952?

Q. Yes, December 31?

A. Well, I don't know exactly what you mean by that.

Q. The Court: Does counsel have any further questions?

Mr. Davis: I think we can bring out the answers of those with Mr. Paddock and with Godchaux.

(Testimony of Florence Paddock.)

The Court: The Court has one more question.

Q. (By The Court): Do you think you have contributed equally to the business which you and your husband have been engaged in?

A. Yes, I feel that I have.

Q. Have you put in as many hours as he has?

A. Just as many, yes.

The Court: Does counsel have any questions?

Mr. Davis: That is all.

Mr. Kay: No.

(The witness was thereupon excused and left the stand.)

Mr. Davis: I would like to call Mr. Silberer now, please.

The Court: Mr. Silberer may be called and sworn.

EARL E. SILBERER

called as a witness on behalf of the plaintiff, and being first duly sworn, testifies as follows on

Direct Examination

By Mr. Davis:

Mr. Davis: Your Honor, I think that the defendant will stipulate that Mr. Silberer is a duly authorized and qualified real estate broker in Anchorage and able to testify concerning values of property here.

The Court: Is that correct?

Mr. Kay: That is correct.

The Court: Very well, let the record so state.

Q. (By Mr. Davis): Mr. Silberer, at my request

(Testimony of Earl E. Silberer.)

in the first part of May did you make an appraisal of certain property belonging to Paddock?

A. I did.

Q. I hand you what has been marked as Plaintiff Exhibit No. 1, dated May 9, 1953, and ask if that is a copy of the appraisalment that you made?

A. It is.

Q. Now, in making this appraisal, Mr. Silberer, at that time did you go through the property that is known as the family home?

A. I did not.

Q. In connection with the property, at that time did you attempt to value it on a conservative basis?

A. I have always tried to base all my appraisals on a conservative basis.

Q. And is this one so based?

A. I would say it on a conservative basis.

Q. In appraising the property did you attempt to take into consideration all the various factors concerning the location and type of the building and the present market of the property?

A. Well, when I make an appraisal of a piece of property I take first the location, surroundings, lot value and then jointly the house and lot value, jointly making my total figure. If this was being broke down where the house was always going to be there it would be my—my opinion would be a lower value on the land.

Q. Are you talking now about the home property?

A. Yes, I am talking about the home property.

Q. In that connection you have put a value on

(Testimony of Earl E. Silberer.)

the land of the home property of \$5,000.00. Now, is it your testimony that the value of the land as such would be less if it is going to be continued to be a home? A. That is right.

Q. You put the higher value on it because the property is located in semi-commercial district, as to the value of the land? A. That is right.

Q. Now, in connection with the commercial property, Mr. Silberer, has there been any particular change in the value of commercial property since you made this appraisalment back in May?

A. On commercial property it is my opinion that the prices are the same as they had been in the last year.

Q. Do you feel then that the prices you have put on the commercial property as of last May are still fair property appraisals?

A. I would say that they are very close in there to the same figure.

Q. All right, now in connection with the house property, you said that you did not go through the house, inside the house at the time you made the appraisalment? A. That is right.

Q. Did you make an inspection of that house this morning?

A. I made a brief inspection of it this morning. I did not enter all the rooms. It was not convenient to enter all the rooms and the interior of the house is very nice and it [64] would, basing it on today's market, after seeing the interior of the house I

(Testimony of Earl E. Silberer.)

might consider increasing the valuation of the house some.

Q. And to what figure would you increase the value of the house after having seen the inside?

A. Well, the total figure of the house and the land, I would say some place, approximately \$20,000.00 is my opinion. If I was to try to sell the house I don't believe I could get any more for it. That is my honest opinion of that.

Q. Do you think, taking into consideration the location of the house and its age and the general construction, the type of building, do you think you could get \$20,000.00 for that house on the present market?

A. It would seem to me that it would be rather difficult to get the exact amount for that, of course, it is always hard for real estate—it is always hard to tell the exact top dollar that one individual will pay for a piece of property.

Q. All right, in your opinion do you feel that if that house were put up for sale today that you could get \$20,000.00 for it?

A. I would say \$18,500.00 and \$20,000.00 some place in that neighborhood.

Q. What is the location of the house?

A. It is on 7th Avenue, I think, I jotted the number down—226 East 7th.

Q. Is that near the cemetery? [65]

A. Yes, it is.

Q. And the cemetery is it—what is it, East C Street?

A. I believe it is East C.

(Testimony of Earl E. Silberer.)

Q. And is this house close to East C Street on 7th? A. That is right.

Q. What sort of house is it? How is it built?

A. Well, it is stucco on the outside, has a large entrance way. On the inside you come into the living room, 2 bedrooms and bath and then a large, well, we call them, vestibules or entrance way at the rear of the house. I did not enter one bedroom or the bath this morning.

Q. All right, then——

A. It was very quick and brief inspection this morning just of the interior.

Q. But the interior of the house is nicer than what you might expect from looking at it from the outside, is that your testimony?

A. That is right.

Mr. Davis: That is all.

Cross Examination

By Mr. Kay:

Q. Just a few questions, Mr. Silberer. In considering that value on the house did you consider the furnishings? [66] A. No.

Q. So that your price of \$18,500.00 to \$20,000.00 would be your considered estimate of the value of the building and the land?

A. That is right.

Q. You noticed that the house was nicely furnished, did you not?

A. It is very nicely furnished.

Q. So considering the value of the furnishings

(Testimony of Earl E. Silberer.)

in the house, would that possible if you sold it completely furnished with freezer, refrigerator, stove, wall carpeting and that type of thing, do you think that might increase the value to the neighborhood of, oh, say, \$20,000.00 to \$25,000.00?

A. I would say approximately from \$2,000.00 to \$2,500.00 Wendell.

Q. Now, Mr. Silberer, how close an examination did you make of the building in which the Paddock Paint and Furniture Store is located?

A. Well, I have been in that building a number of times since I have been in Anchorage and I went down there, I don't have all my figures with me, but I went down and stepped off the building and figured it more or less on a square footage basis and then I put the value of the land at \$25,000.00. I figured out that footage basis figuring 50 foot lot.

Q. Well, that building is an old building which has been considerably remodeled over the years?

A. That is right. [67]

Q. The same is true of the Sunshine Market building?

A. As I understand it the Sunshine Market building is not, if I recall it has been quite some time since I made this and as I recall the Sunshine Market Building is not part of it—the building wasn't being appraised, just the land, am I right on that?

Mr. Davis: No, there was a building.

Mr. Kay: I think that is Item No. 2, isn't it, Ed?

(Testimony of Earl E. Silberer.)

Mr. Davis: Two and three.

Q. (By Mr. Kay): Two and three?

A. That is right, the building or the Sunshine Market was appraised at \$6,000.00.

Q. That is in a pretty delapidated shape?

A. That is right.

Q. And then you didn't appraise the building on the other lot because that building does not belong——

A. That is the one I had mistaken with this.

Q. Do you feel that these figures that you have given then, both on your estimate and on the witness stand, are reasonable conservative figures based on your experience?

A. I would say so, Wendell.

Mr. Davis: That is all, as far as I am concerned.

The Court: Thank you. You may step down, Mr. Silberer.

Mr. Kay: I would like just a moment. Just one other [68] question.

Q. (By Mr. Kay): Mr. Silberer, in considering the value of the home property out there did you consider the double garage in the rear?

A. Yes, we took that into consideration.

Mr. Kay: I see.

Mr. Davis: I would now like to ask, if I may, that Mr. Silberer be excused because he has other business and wants to get back to it.

The Court: Does counsel have any objection?

Mr. Kay: No objection.

The Court: Very well.

(The witness was thereupon excused and left the stand.)

Mr. Kay: Call Mr. Paddock.

HAROLD D. PADDOCK

called as a witness on behalf of the defendant, and being first duly sworn, testifies as follows on

Direct Examination

By Mr. Kay:

Q. Your name is Harold D. Paddock, is it not?

A. Yes, sir.

Q. You are the defendant in this divorce case here today? A. Yes, sir.

Q. Mr. Paddock, how long have you lived in Alaska?

A. Since 1931 in Anchorage, two and a half years prior to that [69] in Juneau.

Q. During all the time that you have been in Alaska you have been in the painting, paint contracting, and paint and furniture business, have you not?

A. Well, I have been in the paint contracting business and paint retail business, but it is not until the later years that I have been in the furniture business.

Q. When you came to Anchorage what business did you go into in March 1931?

A. Paint contracting.

Q. And did you go on your own or did you go in with somebody?

(Testimony of Harold D. Paddock.)

A. I started on my own and then I bought in a half interest in a partnership.

Q. When did you buy that half interest in a partnership? A. In '32.

Q. 1932? A. Yes.

Q. Who was your partner?

A. Edward T. McNally.

Q. He is now deceased?

A. That is right.

Q. Do you recall what you paid for the half interest in Mr. McNally's paint contracting business that you bought back then in 1932?

A. Wasn't too large a sum. About all they had at that time was [70] paint equipment and was somewhere less than \$1,000.00 at that time.

Q. That was in 1932, depression prices too?

A. That is right.

Q. Well, now when did you first open the store?

A. Late '33 or early '34 we had taken on a Dutch Boy agency for Dutch Boy paints, which I still have today, and put in a stock of paints and wallpaper.

Q. And was that store located down in what is now the Sunshine Market Building?

A. No, prior to when we first opened at was where the Richmond Cafe or Bar is now.

Q. Right in the next block?

A. Yes, and I later bought the property and moved down to where the Sunshine Market is.

Q. When did Florence, Mrs. Paddock, come to work for you?

(Testimony of Harold D. Paddock.)

A. About '36, I believe.

Q. Now, at the time she came to work for you where was the store? Was it still the Richmond or had you moved down to the Sunshine Market?

A. Still at Richmond.

Q. When did you buy the Sunshine Market property?

A. I think it was about '37.

Q. Do you recall what you paid for it?

A. Around \$6,000.00. [71]

Q. Did it have the present building on it at that time?

A. It had a building on it which I remodeled.

Q. Was that building an old building at that time or a new one?

A. It was a log building—had a 7 foot ceiling in it before I moved into it.

Q. How extensive was the remodeling which you did do? Do you recall what all you did to it?

A. Well, I raised the ceiling, raised the floor up to level with the sidewalk—the floor was down probably 10 inches or so below the sidewalk. It was a building that was put in before the streets were leveled and made probably 10 inches below the street level. I raised that up to street level, and as I say, there was only a 7 foot ceiling in it so I had to raise the ceiling to 10 foot ceiling and did considerable work on the foundation.

Q. In other words, it was a pretty complete remodeling job?

(Testimony of Harold D. Paddock.)

A. Probably between \$2,000.00 and \$2,500.00 remodeling.

Q. At those prices? A. Yes.

Q. And is the building still substantially in the same shape as it was when you completed your remodeling?

A. Yes, with the exception of a period of several years now, why, the foundation is in need of repair and quite a bit of repair is in need on it. In fact I have to do some before license will be extended to present occupancy in it. [72]

Q. In other words, the City is requiring that you make some repairs to that foundation and other repairs before they will release it for next year, is that correct? A. That is right.

Q. Now, did you pay cash for that building or did you pay some down on monthly payments, do you recall?

A. At the time it was partially cash, yes.

Q. You don't remember how much down and how much was on the balance do you?

A. No, I don't recall exactly that far back.

Q. Well, now you and Florence were married in January 1938, were you not? A. Yes.

Q. Now, at the time you and she were married can you tell the Court to the best of your recollection just what property you had at that time? You had half interest in the paint company in the first place did you not?

A. I had bought out the other half interest of my partner by the time I was married.

(Testimony of Harold D. Paddock.)

Q. Oh, you had bought out Mr. McNally's half?

A. Yes.

Q. Do you recall what you gave him for the other half after you built it up during this period that you were working with him?

A. Well, I don't recall exactly. We had increased our business in stock which we both drew very little money and applied to [73] the business and had increased quite a little to the extent of having a new truck and larger stock of paint and wallpaper and larger employment of men.

Q. You can't recall the figure what you did pay for his half interest?

A. Well, I would roughly say the equity was somewhere between \$10,000.00 and \$15,000.00.

Q. What you mean then is at the time of your marriage you were—your net worth was somewhere between \$10,000.00 and \$15,000.00?

A. Well, including the property and all, probably worth a little more than that, but the business itself—

Q. Oh, that is just what you consider your interest or your paint company worth?

A. Well, we had to take a \$2,500.00 stock to get the agency for the Dutch Boy paints, they required \$2,500.00 stock, and then we increased to that.

Q. That was in 1935 and by 1938 you had built that up—is that your testimony—built up your stock and inventory? A. Yes.

Q. Now, let's see, besides the equity of the Sunshine Market Building and your paint business,

(Testimony of Harold D. Paddock.)

paint contracting business, did you have any other property at the time you were married?

A. Nothing that amounted to anything. I had a lot that I bought on delinquent tax sale that didn't amount to much.

Q. Did you eventually sell that? [74]

A. Yes, I sold that later.

Q. Well, then could you give the Court a rough estimate of what you consider a fair value—fair figure for your net worth at the time of your marriage?

A. Well, that is a little hard to make a statement on that, considering the valuation of the business which was built up over a period of years and bought into a well established business—that was worth quite a bit is the reason that I bought into it and so in dollars and cents to say what it is worth or what somebody pays you for clientele for the business that you had would be hard to state.

Q. Well, you have given us one figure on that, roughly, of just the business alone of around \$10,000.00. Would you say that \$15,000.00 or \$20,000.00 would be a fair figure for your net worth at that time?

A. Yes.

Q. Well, now when did you buy the Sunshine Market, I mean, the store property what is now the location of Paddock Paint and Furniture?

A. 1942.

Q. Was the building already located on the property at that time?

A. Yes.

(Testimony of Harold D. Paddock.)

Q. What was it, a new, old, or what kind of building was it at the time you bought it?

Q. Well, it was pretty badly run down and it was mainly apartments, [75] and—of small apartments, and the portion where the paint store part is now was occupied by the Railway Express Company.

Q. Do you recall what you paid for that property? A. \$20,000.00.

Q. Now, that was in 1942? A. Yes.

Q. And since that time you have substantially remodeled it from time to time, have you not?

A. Yes, it has been completely remodeled, completely rechanged.

Q. Part of it has been reconstructed in fact has it not?

A. You might say it all pretty much has, but is in need of it again.

Q. When did you buy the home property we have been talking about here as your home?

A. Well, it was along about the same time. That was purchased a little prior to that. It was still in '42 or late '41, I don't remember just offhand.

Q. You bought the lot and house separately and then moved the house on the lot, did you not?

A. No, the building was moved on to the lot by somebody else, who tore it up in moving, and it was in pretty sad shape and I bought it very reasonable due to the fact that it was badly torn up. It dropped down, pushed the floor out of it and

(Testimony of Harold D. Paddock.)

all that while turning and pulling it in on the lot, so I bought it pretty reasonable due to that fact.

Q. Do you remember what you paid for the home property back in '41, '42?

A. Neighborhood of \$800.00.

Q. That is both the house and lot?

A. Yes.

Q. Now, you have done considerable remodeling, have you not?

The Court: Counselor is that important, what he paid for it? It was acquired after his marriage.

Mr. Kay: It seems to me it is important in this respect: To bring out the chronology of acquisition of this property. From my point of view I would like to show that it was actually acquired by Mr. Paddock very early in the marriage, either before or at the time of it, or a year or so after the marriage. Now surely we are not going to—I don't wish to debate the point, but the point to me is what has happened since then has largely been, at least as far as the increase in value of this property, has just been normal increase of all property in the Anchorage area by reason of the growth of the area.

The Court: Wouldn't the Court take that into consideration?

Mr. Kay: I certainly hope so. It is just something that I wanted to bring out, however, if I am going into it too extensively I will be glad to hurry it along.

The Court: The Court doesn't want to tell you

(Testimony of Harold D. Paddock.)

how to try your case. The Court just wanted to hurry along unless you think you have overlooked something. [77]

Q. (By Mr. Kay): Then, Mr. Paddock, it has been extensively remodeled, is that correct?

A. I put about—in dollars and cents—better than \$12,000.00 in it and the big majority of the work was done by myself.

Q. Now, then you have since bought a hundred foot frontage on Spenard Road across from Sweum's Grocery?

A. Yes.

Q. What did you pay for that?

A. \$15,000.00.

Q. How much of that remains unpaid on the land?

A. Around—there is a building on it too—around \$12,000.00.

Mr. Davis: I missed that, I am sorry.

A. Around \$12,000.00 I believe.

Mr. Davis: About \$12,000.00?

A. I think that is about correct.

Q. (By Mr. Kay): You then also placed a warehouse building on that property, have you not?

A. Yes.

Q. What was the cost of that building?

A. \$4,200.00.

Q. And getting it on there cost you something too, did it not?

A. \$4,200.00 or \$400.00 to \$500.00, I believe, was the cost of the building to put it on the lot, but

(Testimony of Harold D. Paddock.)

it cost \$800.00 to [78] fix the foundation to support it after it was moved on.

Q. So the cost of that building located on the lot was about \$5,000.00? A. That is right.

Q. And is that paid for—the building?

A. The building is paid for, yes.

Q. Now, you also have a lot in Mt. View, and a small building, do you not?

A. That is right.

Q. What did you pay for that and when did you acquire it, do you know? A. 1950.

Q. And do you recall the amount you paid for it? A. \$750.00 for the lot.

Q. What would you say it is now worth?

A. Between \$1,000.00 and \$1,500.00, maybe.

Q. All right, there was some mention of a recreational site near the Homer Air Strip. About how much do you have invested in that?

A. About \$200.00—between \$200.00 and \$250.00.

Q. Have you received patent to it or is it still pending? A. Yes.

Q. You do have patent? A. Yes.

Q. Do you consider it worth much more than what you have in it? [79]

A. As speculation. I bought it on speculation.

Q. But it has no great value then right now except to hold for speculation, of what you have in it, is that right? A. That is right.

Q. Now, when you and Mrs. Paddock were married she was then working for you in the store, was she not? A. Yes.

(Testimony of Harold D. Paddock.)

Q. What was the nature of her duties at that time, Mr. Paddock?

A. Answering the telephone mainly and taking appointments for contract work and sell paints, mark prices, etc. or show wallpaper.

Q. Just a general job of employee in a paint store or small store, is that correct?

A. That is right.

Q. Now, was there any difference—change in those duties after your marriage? A. No.

Q. What has been the nature of her work in this store then—has her work in the store in the years since that time been substantially the same?

A. About the same I would say, yes.

Q. There has been an addition in the fact that of recent years she has more or less kept the books of the store, has she not?

A. Yes, to a considerable extent. She mailed bills, posted accounts. [80]

Q. And write checks? A. Yes.

Q. Now, who has been the manager. Let's take the paint contracting business first. Did Mrs. Paddock have anything to do with the paint contracting business while you were in it other than answering the phone and taking appointments?

A. No.

Q. She didn't have anything to do with bidding the jobs, did she—estimating?

A. Well, I don't think she would be capable of—

Q. Did she? A. No.

(Testimony of Harold D. Paddock.)

Q. Did she have anything to do with hiring the help in your paint contracting business?

A. No.

Q. Have anything to do with the actual execution of the work whatsoever?

A. No, other than what has been mentioned of answering the phone and taking appointments.

Q. Now, as between—let's take the period down to the first—strike that—when did you go out or stop your paint contracting business?

A. Early part of July of this year.

Q. July of this year? A. Yes. [81]

Q. Now, let's take the period down to, say 1945. Between 1938 and 1945 which was the money maker, the income producer—the major portion—the retail store or the paint contracting business?

A. The paint contracting.

Q. And at the time you got out of the paint contracting business did that continue to be the case, or did the store gradually take the greater—bring in the greater portion of income?

A. Well, that is something that would vary. Depends on how much you wanted to devote to either one of them.

Q. Let's break it down a little further. Between 1945 and 1950 did the paint contracting business continue to be the major income producer?

A. Well, I would say "no" because I was trying to get away from the paint contracting business due to the larger investment and time that it had

(Testimony of Harold D. Paddock.)

taken, I was trying to switch over to strictly a retail business.

Q. About 1945 or thereabouts then you began to devote more of your time to the management of the store than you did to the paint contracting?

A. Yes.

Q. Now, during all of this time, Mr. Paddock, who was the manager of Paddock Paint and Furniture Store?

A. I was.

Q. Who did the buying of supplies and inventory? [82]

A. I did.

Q. When you entered the furniture business who did the buying of furniture?

A. I did.

Q. And you still do. Have you always done the buying for the store?

A. With the exception of one or two occasions I sent my furniture man out to buy.

Q. Has Mrs. Paddock ever really worked in the store in any—what you might call a managerial or executive capacity?

A. Well, I don't quite get you there.

Q. Well, we have covered one point—buying, and who sets the size of the inventory that you have been carrying?

A. Well, you are speaking—she has written out the orders for the buying but I always stated the quantity to buy, if that answers the question.

Q. In other words, who selected who you were going to buy your items from? Did you select your supplies or did she?

(Testimony of Harold D. Paddock.)

A. No, I selected them.

Q. Who decided on what amounts of, let's say, paints you were going to buy at any one time from any one supplier?

A. I always did.

Q. Who decided how much furniture you were going to buy from any one company?

A. Well, I have mainly, but I have a furniture manager that does [83] lots of buying, quantity buying, that I don't question his ability too much on, however, if I take a trip Outside, why, then I do the quantity buying and buy what I think will sell.

Q. Who has—let's see, Mr. Godchaux does your bookkeeping, does he not?

A. Yes.

Q. Now?

A. No, I have a bookkeeper, but he does——

Q. Your accounting?

A. The auditing and reports of income tax.

Q. Who selected Mr. Godchaux?

A. I did. I had him as bookkeeper, part time bookkeeper, several years back, from the time he was keeping various accounts around town, including Ketchikan Spruce Mills.

Q. Who hires and fires the employees of the store?

A. Well, mainly I do.

Q. Have there been occasions from time to time when Mrs. Paddock might either employ or discharge one?

A. She may have hired an employee for the store after we might have agreed on it between us

(Testimony of Harold D. Paddock.)

or something, but I have always hired all my own painters and fired them.

Q. Now, when you found it necessary from time to time to borrow money in the course of your business who has negotiated those loans?

A. I have. [84]

Q. Has it been necessary for you to have Mrs. Paddock's signature on these loans which you got?

A. No, only in my absence and with the exception of the last loan I made which the bank felt was an uncertainty.

Q. That was after the divorce was started?

A. Yes.

Q. Or after the separation? A. Yes.

Q. Prior to that time you borrowed up to \$45,000.00 on your own signature?

A. That is right.

Q. And you have dealt with both the Bank of Alaska and the First National Bank, have you not?

A. Yes.

Q. Now, you have had two bank accounts, one at the First National Bank and at the Bank of Alaska, have you not? A. That is right.

Q. Those accounts are in the name of H. D. Paddock or Paddock Paint and Furniture Store, are they not?

A. Yes. They were originally set up because of the paint contracting and I did work for them both.

Q. Now, Mrs. Paddock's signature has always been honored on both of those accounts, has it not?

A. Yes.

(Testimony of Harold D. Paddock.)

Q. Whether she was writing checks for the business or for operation [85] of the house or whatever it might be, she had authority to write checks on both of those accounts?

A. That is right.

Q. Do you have other employees who are authorized to write checks?

A. I have from time to time.

Q. There are two employees who write checks on the account of the First National Bank now, are there not, or is it the Bank of Alaska?

A. No, neither one.

Q. I see. The bookkeeper and someone else was authorized for a period of time to write checks on the account, were they not?

A. Yes.

Q. Now, Mr. Paddock, how did it happen that a mother with two relatively small children was spending time down at the store rather than being home taking care of the house?

A. Well, didn't like to stay home, maybe. I don't know.

Q. Just liked to take part in the business, is that the idea?

A. Yes, I'd say so.

Q. Was that particularly at your request that she came down and participated in the business as she has?

A. No.

Q. Have you ever suggested that you preferred, that she might put her time to better advantage to take care of the home than the business? [86]

A. Yes.

Q. As a matter of fact, that has been one of the

(Testimony of Harold D. Paddock.)

or something, but I have always hired all my own painters and fired them.

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A. No.

Q. Have you ever suggested that you preferred, that she might put her time to better advantage to take care of the home than the business? [86]

A. Yes.

Q. As a matter of fact, that has been one of the

(Testimony of Harold D. Paddock.)

sources of irritation that led up to this incompatibility, has it not? A. That is right.

Q. Do you feel that Mrs. Paddock has contributed, let's put it this way—strike that—in what proportion, being fair to both of you, to the best of your ability, in view of the situation, in what proportion do you honestly feel that Mrs. Paddock has contributed to the rather pleasant financial position in which you find yourself today? I mean, by participating in the business what do you feel she has contributed to it?

A. Not any more than the salary of anybody else.

Q. In other words, she actually—in your opinion she actually contributed just about, perhaps a little more to be fair about it, than the salary which you would have had to pay anyone else to do the same work? A. That is right.

Q. Well, there have been some expenses in connection with that, has there not, in the way of maids, housekeepers—who was taking care of the children while she was down at the store?

A. Well, the first couple of years of marriage her mother kept them and hired housekeepers and women to come in and help with the housework.

Mr. Davis: I am sorry, Mr. Paddock, I am not understanding [87] what you are saying.

A. I said in the stages of when the kids were younger that we hired housekeepers to take care of the kids, to come in during the day and Mrs. Paddock took care of them at night.

(Testimony of Harold D. Paddock.)

Q. (By Mr. Kay): Course once the girls got to be, in later years, in school, well, that was not so much a problem, was it?

A. That is right.

Q. You have never adopted the two girls, have you, Mr. Paddock? A. No.

Q. Although they have used your name and you have been a father to them down through the years?

A. That is right.

Q. Now, Mr. Paddock, did you have occasion, while we were preparing for this suit, to go over your income tax returns for some of these previous years? A. Yes.

Q. Have you and Mrs. Paddock ever filed a partnership tax return? Do you know what a partnership tax return form is? A. No.

Q. Well, do you know whether you have ever filed one or not?

A. I have filed a partnership return?

Q. You and she have never filed a partnership return, is that correct? A. That is right.

Q. Since about 1948, however, you have filed joint tax returns [88] as husband and wife, have you not? A. That is right.

Q. Prior to that time Mrs. Paddock's salary was shown as a business expense of the business, was it not, on your personal tax return?

A. That is right.

Q. That was done, I presume, at the advice of whoever was keeping your tax records and books at that time? A. Yes.

(Testimony of Harold D. Paddock.)

Q. As a matter of fact, she drew no salary as such but was permitted to draw whatever she wanted or needed from these bank accounts?

A. That is correct.

Q. When was that piece of property out next to the home bought, Mr. Paddock? That is the one that is in Mrs. Paddock's name?

A. About two years ago.

Q. Mrs. Paddock bought that on her own, did she not? A. Yes.

Q. I think you were Outside and didn't know about it until your return?

A. That is right.

Q. Mr. Paddock, approximately how much money have you drawn out of the business for your own use during the year 1953 down to date, do you know? A. \$100.00 a month. [89]

Q. You have an apartment there in the building, do you not? A. That is right.

Q. So you have drawn about \$1,100.00 so far this year?

A. I would say about \$1,200.00.

Q. Is the business doing as well this year as it did last year, Mr. Paddock? A. No.

Q. There is somewhat of a slump noticeable in the business, is there not?

A. Well, there is a considerable slump and even though you do have values, we are still not making as large profit as we have in the past. I'd say partially due to too much competition, too many furni-

(Testimony of Harold D. Paddock.)

ture stores, some of them going broke, closing out. It has made it very difficult to——

Q. Now, can you think of anything, Mr. Paddock, that I overlooked that I should ask you about before I finish my examination?

A. I think you have done pretty well.

Mr. Kay: Your witness, Mr. Davis.

The Court: Court stands recessed for ten minutes.

Recessed 3:06 o'clock p.m. Reconvened 3:20 o'clock p.m.

The Court: You may proceed, Mr. Davis.

Cross Examination

By Mr. Davis:

Q. Mr. Paddock, you had Mr. Godchaux the accountant draw up a tentative balance sheet and profit and loss statement for the first eleven months of 1953, did you not? A. Yes.

Q. And you brought that to court here?

A. Yes.

Q. I hand you that paper and ask if that is the tentative profit and loss statement and balance sheet prepared by Mr. Godchaux for the first eleven months of 1953?

A. This was mainly drawn up by my bookkeeper and not Mr. Godchaux.

Q. Did Mr. Godchaux check it?

A. I believe not.

Q. Then just drawn by your bookkeeper in the store? A. That is right.

(Testimony of Harold D. Paddock.)

Q. Has drawn it through November 30, 1953?

A. Yes.

Q. I'd like to then at this time, Your Honor, offer this statement in evidence, if I may.

The Court: Is there any objection?

Mr. Kay: I have no objection, only to point out that that will, of course, be superceded by the completed accounting at the end of the year by Mr. Godechaux.

The Court: Very well, it may be admitted and marked Plaintiff Exhibit No. 4. [91]

(The document above referred to was thereupon received in evidence as Plaintiff's Exhibit No. 4.)

The Court: As of November 30, Mr. Davis?

Mr. Davis: November 30.

Mr. Kay: Incidentally, we don't vouch for the accuracy of that.

The Court: That is understood.

Q. (By Mr. Davis): Now, the inventory on that balance sheet is an estimated inventory, I believe?

A. That is right.

Q. Outside of the inventory being estimated, the rest of the figures are either taken from last year or additions that you bought this year and that sort of thing, is that right? A. Yes.

Q. And liabilities shown are the actual liabilities as of the end of November? A. Restate that.

Q. I said the liabilities shown on the balance sheet are the actual liabilities as of the end of November, 1953?

(Testimony of Harold D. Paddock.)

A. Well, I'd say partially arrived at from January figures.

Q. I think maybe you misunderstood me. The liabilities in the notes payable and accounts payable and that sort of thing are the actual figures taken as of the end of November, are [92] they not?

A. That is right.

Q. I don't believe that that particular statement makes any reserve for taxes, for income taxes?

A. No.

Q. Now, I notice on the statement, on the tentative statement and realizing, of course, that it is tentative by reason of the fact you don't have a final inventory, I notice that that statement shows a much healthier picture for net worth than the one as of the end of the year, last year, is that right?

A. I would have to compare the two. Offhand I don't—

(Document is thereupon handed to the witness.)

Q. Your net worth of the entire business and property last year, Mr. Paddock, at the close of business last year was a hundred and—what is it—a hundred sixty three thousand odd dollars?

A. That is right.

Q. And the net worth shown on the tentative statement is how much?

A. What they have here is two hundred thirty one.

(Testimony of Harold D. Paddock.)

Q. I think you are reading the wrong line. That figure right above that.

A. Oh, yes, one seventy two.

Q. Well, now doesn't it say right at the bottom—net worth \$231,000, isn't that what it says there? May I see it?

(Document is handed to Mr. Davis.) [93]

Q. I think that is correct, the \$231,000.00 is the total of all liabilities against the net worth. What is the total of net worth on the statement?

The Court: Mr. Davis, wouldn't the paper and exhibits speak for themselves?

Mr. Davis: I presume they will.

Q. (By Mr. Davis): Now, Mr. Paddock, what is the first year that you paid income tax to the United States Government?

A. Are you speaking of Anchorage?

Q. I am speaking of your business here. What is the first year you paid income tax to the Federal Government?

A. About 1934, prior to that my business was carried under the name of McNally and I merely paid in one half of the income tax and went under his name.

Q. Mr. Paddock, are you certain that you paid income tax to the Federal Government as early as 1934?

A. Well, I would say it was '34 or '35. It was after I bought out his half interest that I paid income tax.

(Testimony of Harold D. Paddock.)

Q. Do you have any idea at all what the income tax exceptions were that far back?

A. Offhand I couldn't tell you, no.

Q. As a matter of fact, small businesses didn't pay any income tax, Mr. Paddock, until '40, around there, isn't that correct?

A. I know I had to file some kind of return.

Q. Are you talking now about your City, Personal Tax, Personal Property Tax Returns?

A. Well, I don't remember that far back. I remember when we started paying income tax. If there was any income tax to pay for businesses I paid them.

Q. Yes, but you don't remember now as to when it was that you started paying income taxes, is that correct?

A. Offhand I couldn't say, no, sir.

Q. Do you have books, Mr. Paddock, that go back as far as 1938 reflecting what your business did?

A. I have most of them, but that is so far back it would be a problem to find them all.

Q. Where do you keep those books?

A. I—generally after a period of three years are filed in some paint cartons and marked what they are and filed away.

Q. And where would they be now?

A. They would be in the basement and they would be in the attic of the warehouse.

Q. When you testified awhile ago that you thought your net worth was \$15,000.00 to \$20,000.00

(Testimony of Harold D. Paddock.)

at the time you were married, your equity in your property, I think is the way you put it, your property and your business what did that consist of, Mr. Paddock?

A. Ford Pickup-truck, ladders, drop clothes, paint brushes, all of the necessities of a paint contracting business. [95]

Q. Well, all right, that wouldn't exceed \$2,500.00 at the outside would it, at that time?

A. Well, the car alone would be probably \$2,000.00 at that time.

Q. How old was the car? How old was the pickup-truck? A. It was new.

Q. Brand new at the time you were married?

A. Yes.

Q. All right, taking the car as being \$2,000.00 how much would there have been in paint contracting supplies, ladders, drop clothes and stuff of that kind?

A. Well, there are various things that I have. \$1,000.00 or \$2,000.00 in brushes awfully easy and still haven't a big pile of brushes.

Q. At the time you were married there was very little business in town, was there?

A. There was considerable in the paint contracting business because I was practically the only paint contractor here.

Q. But there wasn't any new construction going on here at all, was there?—outside of the high school building or what is now the Junior High School building, they built that about 1933?

(Testimony of Harold D. Paddock.)

A. Considerable new homes being built, of large commercial construction there wasn't much.

Q. Is it your testimony that in 1938 there was considerable new homes being built, Mr. Paddock?

A. There was considerable increase in the beginning of population along about that time.

Q. As a matter of fact, Mr. Paddock, there wasn't any increase in population until 1941 or 1940 when the Army came, isn't that true?

A. I would say, no.

Q. What was the population of Anchorage in the 1940 census, if you know?

A. About three thousand.

Q. Actually five, wasn't it?

A. I couldn't state that figure. Roughly I would say three thousand.

Q. All right.

A. When I first came here there was fifteen hundred.

Q. And that was 1931, you say? A. Yes.

Q. As a matter of fact, Anchorage did increase a little bit at the time they put in the Matanuska Valley Colony in 1935, did it not?

A. I would say, yes.

Q. Then wasn't it more or less stationary from that time until the Army moved in in 1940?

A. Yes, increased rapidly after that.

Q. All right. I wish that you would get out, please, the books that you kept during the years 1937, '38 through 1940 so we [97] can give them to Mr. Godchaux. Now, when was it that you

(Testimony of Harold D. Paddock.)

started having an Auditor go over your books at the end of the year?

A. Well, I have always had my books audited and somebody make out the income tax report.

Q. All right, going back to the year 1939, 1938, who did your work at that time, your auditing?

A. Probably, along that time probably Bill Head.

Q. And for how long a period of time then did Bill Head keep your books?

A. Oh, perhaps two or three years.

Q. And who took over after Bill Head didn't keep the books?

A. Well, for a couple of years I had an accountant. I can't recall his name right offhand.

Q. Hand or Hart or something like that?

A. I just can't say his name right at—

Q. Did you have Jones and Anderson for awhile? A. Yes, I did.

Q. And you have had Godechaux now for the last five or six years? A. That is correct.

Q. All right, now what year was it that you mixed up with the Savage Painting Company contract? A. '48, '49.

Q. Now, in that case, Mr. Savage, I believe, had a contract with The Alaska Railroad to paint a certain bridge, is that right?

A. That is right. [98]

Q. And you guaranteed performance of his work?

A. I co-signed the bond, yes.

(Testimony of Harold D. Paddock.)

Q. And when Mr. Savage wasn't able to complete the contract then you had to take over and finish up the job, is that right?

A. That is right.

Q. Now, you didn't make any particular money out of that job, did you? A. No, sir.

Q. In fact you lost money?

A. That is right.

Q. And that required two seasons, didn't it, on that job? A. That is right.

Q. Two summer seasons and you spent those two seasons working on that job with the Railroad, did you not? A. Majority of it, yes.

Q. And then one season, I believe at least one season, you went fishing down the Inlet, did you not? A. About two months.

Q. What year was that? A. '42.

Q. Was there more than one year or just the one? A. Well, I fished two years.

Q. And for about two months each year during the fishing season?

A. No, I didn't stay the whole fishing season. The first year [99] I had an opportunity to make more money at that time in fishing than I was making in the paint contracting.

Q. During that time Mrs. Paddock took care of the store and whatever there was to do, did she not?

A. As far as the store. I had a paint foreman that ran the paint contracting and paint estimating.

Q. And while you were down the Inlet anybody

(Testimony of Harold D. Paddock.)

that had any business came to Mrs. Paddock, is that right?

A. Well, I would make a trip into town almost once a week.

Q. But you weren't available during the week. You weren't available while you were down the Inlet and no way of getting in touch with you?

A. Yes.

Q. How?

A. Well, this daily service from the local cannery. Tender came to the fishing site each day.

Q. All right, to get back to what—then during the time you were not here Mrs. Paddock had full charge of the store, is that right?

A. Yes and no. She had no authority or ability of contracting paint jobs which was mainly the source.

Q. I am talking now about your store. She did whatever buying there was to be done or that sort of thing or what selling was done in the store, she did, isn't that right?

A. Well, I would say very little buying would be done during [100] this time. The selling, yes.

Q. This is summer season, isn't it?

A. Pardon?

Q. Summer season we are talking about?

A. Yes.

Q. And most of the paints that—most people that do painting do it in the summer season?

A. No, not necessarily. The exterior they have

(Testimony of Harold D. Paddock.)

to do in the summer. The interior can be painted at any time.

Q. But as a matter of fact most of the contract jobs were let in the summer and that is when the painting was done, isn't that right?

A. I would say, no, that I kept lots of hotel work and that type of work, which was their slower season, that I did during the winter.

Q. I am talking now about selling paint through the store. Most of the paint that was sold through the store would be sold in the summertime, anyway a large part?

A. It will run heavier to sales in the summer than winter due to the fact that you are doing outside painting.

Q. All right, now during the time you were up on the bridge job, the same thing was true, was it not? Mrs. Paddock was in charge of the store while you were gone?

A. Yes.

Q. Now, as a matter of fact, is it your testimony that you went [101] ahead and ran this business without consulting Mrs. Paddock at all about it?

A. Will you restate that question?

Q. Didn't you, as a matter of fact, and Mrs. Paddock consult back and forth about these various jobs, about the way the business was going to be run, when you were going to borrow money and that sort of thing?

A. No, if I figured the paint job, why, she wouldn't know whether it was enough or too little.

Q. You are talking now again about the con-

(Testimony of Harold D. Paddock.)

tracting business. I am talking about the general overall business. Isn't it a fact that you did consult and advise with her as to various things—operation of the business, when you transferred from a paint store to furniture store—didn't you actually consult with her and advise with her on those things?

A. In some instances, yes, other instances, no.

Q. Now, in connection with this money that you borrowed last summer. You remember that you made an arrangement to borrow money with the bank, remember that? A. Yes.

Q. And the bank, I believe, required her signature on the note, did they not?

A. They did due to the fact this was in litigation of settlement.

Q. Now, as a matter of fact, it wasn't in litigation at that time, was it? Suit wasn't filed for several months after this note, [102] isn't that true?

A. I believe that is true, but the reason they gave me was just as I have stated.

Q. All right, but what was—as a matter of fact the bank would not let you have the money until such time as she signed the note and mortgage, is that not correct?

A. That is correct.

Q. And in the meantime she was refusing to sign the note and you had checks bouncing around town because you didn't get the money, isn't that right?

A. No, I had no checks bouncing.

Q. Well, you had written checks you couldn't

(Testimony of Harold D. Paddock.)

cover because you didn't have this loan, isn't that correct?

A. I had made some purchases with the tentative settlement that I would go ahead and run the business and when our settlement wasn't reached it left me in a short spot there for a while.

Q. All right, you talked about having a housekeeper from time to time to take care of the children. That was a very small portion of the time, was it not?

A. Yes, probably 10:00 o'clock in the morning until 3:00 or 4:00 o'clock in the afternoon.

Q. But you say it was for a relative short period of time over the years. You didn't have a housekeeper very much of the time over the years, did you? [103]

A. Well, up until a few months ago there was a housekeeper came in once a week and cleaned house and did various things around the house.

Q. That would be just somebody coming in to clean house? A. Yes.

Q. All right, now you said that you had drawn \$100.00 a month only during the year 1953?

A. That is about right.

Q. Now, you live in an apartment owned by the business, don't you?

A. I live in an apartment above the store building, yes.

Q. That building is listed as part of the assets of the business? A. That is right.

(Testimony of Harold D. Paddock.)

Q. Your lights and your fuel are paid for by the store, is that correct? A. That is right.

Q. Now, you have an automobile, I believe, old one? A. I have a '47 Dodge.

Q. And the expenses of keeping that car up likewise are paid through the business, are they not? A. That is right.

Q. And I believe this year you went to the States and spent a couple of months there, is that right?

A. About six or seven weeks.

Q. When did you go out and when did you come back? [104]

A. About the last week in January.

Q. Then when you went out when did you come back?

A. Well, it was sometime in the latter part of February.

Q. Well, it was very near two months, was it not, that you were gone?

A. It was close to that, yes.

Q. And I believe your expenses out of that trip were all paid for out of the store?

A. They may have been—part of them, yes, I would say so.

Q. All right, now in connection with the figures, Mr. Kay quoted here as to Mrs. Paddock's drawings this year, you have included the trade-in price of that car, have you not? A. That is right.

Q. So the \$15,000 and some odd dollars he talked about includes the trade-in value of the car?

(Testimony of Harold D. Paddock.)

A. That is right.

Mr. Davis: I think that is all, Mr. Paddock.

The Court: Any redirect?

Mr. Kay: Yes.

Redirect Examination

By Mr. Kay:

Q. That amount is actually in excess of \$16,000 is it not? A. Yes. [105]

Q. And I believe the trade-in value of the car was \$2,900.00? A. \$2,900 I believe.

Q. Now, Mr. Davis questioned you about your contracting business. Right about the time of your marriage how many contractors were there in town at that time?

A. When I first came here there were seven and along about that time there was not more than three.

Q. What percentage of paint contracting would you say you were getting?

A. 75 or 80 percent.

Q. You had by far the most successful business, did you not? A. That is right.

Q. Now, Mr. Davis also questioned you about consulting and advising with Florence from time to time on these investments and changes of business, you said from time to time you did consult with her. Were you consulting or advising her in any business capacity or in the normal fact that husband and wife discuss problems with the wife?

A. Well, merely a discussion.

(Testimony of Harold D. Paddock.)

Q. Were you seeking her advice as business advisor or associate?

A. No, I wouldn't figure it would be a good deal on something we generally didn't agree on.

Mr. Davis: Would you read back the latter part of that? I have a hard time understanding.

(The Reporter thereupon read back the last answer.) [106]

Q. (By Mr. Kay): Now, at the time of this last bank discussed here—which bank was that?

A. Bank of Alaska.

Q. You deal with Mr. Mumford all along?

A. Yes.

Q. Did Mr. Mumford know at that time you and Mrs. Paddock was separated and divorce was in the offing?

A. He knew that we were in the process of separating, divorcing.

Q. Well, you had been separated for many months at that time? A. That is right.

Q. Mr. Mumford and you have been business associates and dealt together for years, have you not? A. Yes.

Q. And he was well aware of the situation?

A. That is right.

Q. And he told you that the reason he required her signature was because of the separation and pending divorce? A. That is right.

Mr. Davis: I couldn't object to that, Your Honor. I don't want to.

Mr. Kay: Since it was brought out by——

(Testimony of Harold D. Paddock.)

The Court: Well, there is no use of counsel commenting unless he does something about it.

Mr. Kay: I will rush on to the next question before he does. [107]

Q. (By Mr. Kay): Mr. Paddock, Mr. Davis referred to your living in an apartment owned by the business and car expense was paid by the business, actually what was paid by the business? Who owns that building, Mr. Paddock? A. I do.

Q. It is not owned by any firm which you are aware of? A. No.

Q. It is Harold D. Paddock?

A. That is right.

Q. And the car expense would be the same, would it not, it would come out of one pocket into another? A. That is right.

Mr. Kay: I have no further questions.

Mr. Davis: My point on that, Mr. Paddock is that your actual living expenses are included with these other items, are they not?

A. No, my living expenses, such as groceries and personal expenditures is charged to my personal account.

Mr. Davis: I understand that, but your lights, your heat, your automobile and your trips are paid for outside of the \$100.00 a month you have been talking about?

A. That is right, as far as being used for business purposes.

The Court: The Court has several questions.

(Testimony of Harold D. Paddock.)

Examination by the Court

By the Court:

Q. Do you know whether or not you filed a partnership return and then an individual return in the conduct of partnership? A. No.

Q. Well, isn't it a matter of fact, that you filed one return, which is your own return, even if you are in partnership? A. That is right.

Q. Do you think the plaintiff has been a good mother to her own children? A. Yes.

Q. The Court understood you to state that you went out of the contracting business in July 1953, is that correct? A. That is right.

Q. The Court understood you to state that most of your money had been derived from the contracting business, is that correct?

A. Earlier stages of it, yes.

Q. Then why did you go out of the contracting business?

A. Well, contracting business was getting like the furniture business is today—too much competition.

Q. If that is the case, why did you keep the store and give up the contracting business? They are both competitive.

A. That is true, but there wasn't money to be made in the last few years in the paint contracting business. There had been [109] in the past. I don't know if any one of us has made any money in the last few years.

Q. Isn't that true of the furniture business now?

(Testimony of Harold D. Paddock.)

A. At the present date, yes.

Q. Wasn't that also true as of July 1953?

A. No.

Q. Well, isn't it a fact that you had the Warehouse Sales in 1953 over here on 5th Avenue?

A. Yes, that is right. I was still doing quite a volume, but not as much profit as I had been, more or less, competing with their prices.

Q. Weren't you doing quite a volume of business also with the paint contracting and not making as much profit likewise?

A. For quite a few years I have been cutting down, cutting down to only just two or three men in the paint contracting which more or less run themselves, supervised their own work and I haven't been in that contracting field, I haven't taken any large jobs for several years.

Q. The Court still is in doubt as to what was the real reason why you discontinued the contracting business and went into the furniture business entirely in July 1953 when you testified——

Mr. Kay: It is still paint and furniture.

The Court: Very well.

Q. (By the Court): ——you just testified that the contracting business was not [110] so profitable as likewise was not the furniture business. I can't understand that.

A. Well, I made a statement that at the time I went into the furniture business I was about the third store to be in the furniture business.

(Testimony of Harold D. Paddock.)

Q. I am interested in '53, not when you went into business.

A. And you want to know why I wasn't making so much money?

Q. No, you testified, as the Court recalls, that you made most of your money in the paint contracting business, you also testified there wasn't much money in the furniture business. The Court also recalls that you testified that you went out of the paint contracting business in July '53, now, why did you go out of the paint contracting business where you had made most of your money and still remain in the furniture business where you likewise were not making much profit. What is the reason?

A. For the reason that I put my money from the contracting business into the furniture business and have a considerable more inventory in furniture and paint business. I devoted my time to sell—and planned for years to get away from paint contracting business.

Q. Then the reason is you wanted to get away from the contracting business?

A. That is right.

The Court: Well, the two statements are irreconcilable. [111]

Mr. Kay: What two statements?

The Court: One that he made a lot of money from the contracting business——

Mr. Kay: Let me—could I ask a couple more questions?

The Court: Yes, the Court is through now.

(Testimony of Harold D. Paddock.)

Further Redirect Examination

By Mr. Kay:

Q. The "hayday" you might say, of paint contracting business as far as you were concerned as it being your major business was in the years prior to 1945?

A. That is right, and you had a labor problem in during the way that you couldn't get qualified workmen and quantities of work from laborers that you used to get in the past and it was unpredictable of how to figure a job as to how you were going to come out on it.

Q. Up until that time you had a balance of where your store was relatively small and your paint contracting business was large, isn't that correct? A. That is right.

Q. Now, just because you would rather be in the furniture and paint store business, you have shifted that balance, isn't that correct? Now you have a large store and paint business and you dropped out of the paint contracting? [112]

A. That is correct.

Q. And that has been a matter of taste and choice on your part and matter of highly competitive nature of the paint contracting business as it exists in Anchorage today?

A. That is correct, and sell paints to the paint contractor instead of competing against them in competitive bidding.

Q. Would that disasterous experience you had with The Alaska Railroad bridge have had a little

(Testimony of Harold D. Paddock.)

bit to do with your getting out of the paint contracting business? A. Yes, sir.

The Court: Well, counsel can see the confusion in the Court's mind based upon his own testimony.

Mr. Kay: It is not clear to me just what the confusion is. He wanted to get out of the business.

The Court: That is right. This is the first time he stated that.

Further Recross Examination

By Mr. Davis:

Q. Mr. Paddock, when was it that you moved the paint store into the McNally building? What year was that? A. '45 I believe.

Q. Now, isn't that the year that you expanded your store? Up to that time you didn't have much room for a store? [113]

A. That is right.

Q. When you moved over across the street you expanded and took on paint and wallpaper and had a big store from that time on, isn't that right?

A. Well, the main reason we went into the furniture business was during frozen rental rates by the O.P.A., that didn't allow rental rates to increase with property increases and other expenses.

Q. Now, Mr. Paddock, the only way the rentals might enter into this was the rental of apartments upstairs?

A. No, where the furniture store is. Now that was all apartments.

Q. That was apartments at that time?

(Testimony of Harold D. Paddock.)

A. Yes.

Q. But to get back to my original question your paint store actually expanded two or three times in space from the time you moved across the street to your present location, did it not?

A. Yes.

Mr. Davis: That is all.

Mr. Kay: No further questions.

The Court: You may step down, Mr. Paddock.

(The witness was thereupon excused and left the stand.)

Mr. Kay: Defense rests, Your Honor.

The Court: How much time does counsel want for argument?

Mr. Davis: I would like to call Mrs. Paddock for a couple [114] of questions on rebuttal, if I may. As far as argument is concerned I would just as soon leave the matter without argument or if Your Honor wishes it argued I would prefer to wait until we get the account in so we know what we are talking about.

The Court: Very well, Mrs. Paddock may be called for rebuttal.

Mr. Kay: Fine.

Mr. Davis: Looks good to me.

FLORENCE PADDOCK

recalled as a witness on behalf of the plaintiff on rebuttal, having been previously sworn, testified as follows:

By Mr. Davis:

Q. Mrs. Paddock, did you hear Mr. Paddock testify that the only reason you went to the store was because you didn't want to stay home?

A. Yes.

Q. Did you hear him testify that he had asked you to stay home, he didn't want you down at the store, that you wouldn't stay home and work at home? A. Yes.

Q. Now, as a matter of fact, Mrs. Paddock, do you recall any occasion, until the last few months, that Mr. Paddock ever told you that he didn't want you around the store? A. No. [115]

Q. As a matter of fact, were you working in the store with the consent and on your own mutual agreement?

A. Sure, because I wanted to help out.

Q. And did he want you to help out?

A. Well, sure.

Q. That is all.

Mr. Kay: No questions.

The Court: You may step down.

(The witness was thereupon excused and left the stand.)

Mr. Davis: At this time, if the Court please, I would like to request that Mr. Paddock be required to furnish the sum of \$500.00 to Mrs. Paddock as

balance of moneys that it would be necessary for her to have to live this month and that until the matter is finally disposed of that Mr. Paddock pay Mrs. Paddock the sum of \$700.00 per month. I also would like to request that Mr. Paddock either pay to Mrs. Paddock or pay the bills, one or the other, in the amount of roughly \$2,000.00 which have been incurred by reason of the fact he has been cutting down the payments. I also would like to request that Mr. Paddock at this time make a payment toward counsel fees in connection with this case. Now, as to the first matter I am willing to consent that any moneys that are paid to Mrs. Paddock at this time and during the course of final settlement in this matter may be taken off any settlement as has been agreed upon or ordered by the Court. As far as attorney fees are concerned, I would like Mr. Paddock to [116] pay those.

The Court: Does counsel for the defendant have anything to say?

Mr. Kay: I certainly do, Your Honor. In the first place it is pretty incredible that there should be \$2,000.00 worth of unpaid bills incurred by Mrs. Paddock in connection with her living expenses when Mrs. Paddock has received \$16,000.00, minus, let's say, \$3,000.00—\$2,900.00, would be \$13,000.00 in the first eleven months of this year and has \$2,000.00 worth of bills unpaid. There is something wrong. I can't understand anybody who can't live and maintain herself under reasonable circumstances on the sum in excess of a thousand dollars a month and still get \$2,000.00 worth of bills to be

paid and if there is going to be a property settlement here, I think those bills should come out of it and I think the amount of money received this year should be taken into consideration in reaching any figure in this case and if the Court is going to reach a property settlement, I should think Mr. Davis would be able to wait for his attorneys fees until that settlement is reached and Mrs. Paddock pay her own attorney the same way as I expect Mr. Paddock to pay his. I see no reason why Mr. Paddock should pay her attorney or the extra bills. Now, if the Court is setting a reasonable sum for payment to Mrs. Paddock, pending decision of the case, I have no objection to that whatever and he certainly has been making payments of reasonable sums, it seems to me. It is true in the last few months he, rather than just hand over a thousand dollars or so, has gone and tried to pay some of these bills and paid them first and then handed to her the balance, but I don't see anything wrong in that, however, we are perfectly willing to hand her whatever amount the Court says is fair and reasonable, provided that that money isn't tossed away somewhere and then Mr. Paddock expected to pay a sum more—thousand dollars worth on top of that. I think we ought to be reasonable. He doesn't have a lot of money.

Mr. Davis: Maybe Mr. Kay misunderstood my suggestion. It was that the bills be paid out of Mrs. Paddock's settlement, whatever it may be. Now, I don't know, Mr. Kay says there couldn't be any such bills, but the fact of the matter the evidence

stands undisputed that there are such bills and, of course, it seems obvious that a person who is living on a scale of something in excess of a thousand dollars a month, then they are cut down to \$200.00 a month, plus payment of lights and oil, it must be evident there is going to be some distress and the testimony stands undisputed that at the present time there are about \$2,000.00 worth of bills to be paid. I don't care whether Mr. Paddock pays direct itself or whether it is paid to Mrs. Paddock to pay, but I would like to have him pay it.

The Court: Well, the Court is concerned about the fact that the plaintiff—is that \$13,000.00 to justify the Court that she should be paid some additional sums of money. There is no evidence of sickness or insinuating circumstances. How does [118] counsel justify that motion?

Mr. Davis: Your Honor, to begin with the plaintiff worked undisputed for three or four months this year and received no money for it. That is the first thing—no money. In the second place, if you look at the balance sheet you will see that this business is making roughly \$25,000 to \$26,000 net this year, at least it shows there just under \$26,000 for the first eleven months. If she has any interest in that business, and I think all the evidence shows that she does, certainly she is entitled to some money out of that business. Now, what she did with the \$13,000 earlier this year I don't know, except that I know what it cost me to live here and I know that large amounts of it went for living expenses and send those kids to school and that

sort of thing. The fact of the matter is that she was getting \$1,000.00 and later \$800.00 and so forth and within the last four or five months she has been getting \$600.00, \$500.00, \$400.00 and \$200.00, so it is obvious that she is living on the same scale that she was before. She can't meet her payments out of what she is getting now.

The Court: Well, the Court feels that something should be paid to her pending the determination of the matter, but the Court is concerned about—counsel when you make no proof of the circumstances beyond the statement that there is \$2,000.00 odd dollars and there is no rebuttal, and yet there has been over \$13,000.00 paid to her. [119]

Mr. Davis: We admit she has drawn roughly \$13,000.00 in cash this year.

The Court: Well the Court feels this: That at least she should be paid \$750.00 pending the determination of this matter and counsel for the defendant will have no objection?

Mr. Kay: No objection.

The Court: As to attorneys fees, the Court sees no reason why counsel can't wait until determination of the matter which will be made promptly and which is demand payment and which is standard procedure at this time. Now, as to the bills the Court would like to have Mrs. Paddock take the witness stand as to these bills.

FLORENCE PADDOCK

recalled as a witness on behalf of the plaintiff, having been previously sworn, testifies as follows:

By the Court:

Q. Mrs. Paddock, what are these bills comprised of?

A. Well, I owe my aunt \$1,000.00. Do you want me to tell you the amounts?

Q. Yes. A. Owe my aunt \$1,000.00.

Mr. Kay: What is her name?

A. Mrs. Decker.

Q. (By the Court): Just enumerate. [120]

A. And my Mother \$500.00, then I owe \$135.00 and my light bill.

Q. What is the \$135.00?

A. That is for purchases in the States—and \$350.00.

Q. And whom is that owed to?

A. Theresa Shop.

Q. Is that for Christmas purchases?

A. No, that was before.

Q. Over a period of time? A. Yes.

Q. And what other bills? That makes \$1,885.00.

A. Well, I owe insurance on my car.

Q. How much does that amount to?

A. \$135.00. I think there are some smaller ones but I can't remember them right now.

Q. How about—you testified that you owed some electric bills, is that right?

A. I imagine around \$35.00.

Q. Did you say, Mrs. Paddock, this morning

(Testimony of Florence Paddock.)

when you testified that you owed for tuition of your daughters fees? A. Oh, yes.

Mr. Davis: How much is that and to whom?

A. Well \$185.00.

The Court: Who are they owed to?

A. Reed College and then board and room for my younger daughter to her aunt. [121]

The Court: That is \$85.00?

A. Yes.

The Court: Thank you.

Mr. Kay: Could I ask a couple of questions?

The Court: The Court is—we shouldn't open up the trial now. Counsel made the motion, if counsel feels you are justified in making the request, why, go ahead. Do you desire to ask further questions?

Mr. Kay: No, Your Honor.

(The witness was thereupon excused and left the stand.)

The Court: Well, it appears to the Court that there are a number of these bills that should be paid, the insurance on the car, electricity, Reed's College and Board and Room. After all the defendant married the plaintiff at the time she had two children and assumed the responsibility and the Court feels, under the circumstances, that is not unreasonable. Also, the question of purchases in the States for \$135.00, I suppose that is for the children. The Court then instructs the Clerk to enter a minute order that the defendant be required to pay \$135.00 on purchases in the States, \$100.00 payment for Theresa Shop—

Mr. Kay: I think that bill—Mr. Paddock thinks he has already paid that bill.

The Court: Well, if he hasn't then he should pay something towards that. \$135.00 on insurance, \$35.00 on electricity, \$100.00 to Reed's College for tuition and \$85.00 for the board and room and also the Court feels that for the months of November and [122] December the total sum should be paid to the plaintiff, in the sum of \$750.00.

Mr. Kay: November and December?

The Court: November and December because the testimony——

Mr. Kay: Your Honor, could we take into consideration the amounts of these payments?

The Court: Well, you are taking into consideration what he has paid by way of the \$200.00 this month, that would leave \$550.00 balance.

Mr. Kay: But, in addition to the \$200.00 which he gave her cash he paid \$300.00 worth of her direct living expenses for the month, if you see what I mean, so he really has paid her \$500.00. Now, if you want it brought up to \$750.00——

The Court: Well, the Court feels—this is Christmas time, the plaintiff has worked together for a long time, after all she is entitled to some consideration.

Mr. Kay: No doubt about it. It is just a question of how much consideration. Just a question of \$13,000.00, I know I would gag a little even at Christmas time.

The Court: That may be your thinking, but the

Court feels the plaintiff testified she has a great interest in the business and——

Mr. Davis: I wonder if we might have a statement as to what bills have been paid and that sort of thing after we have a check showing what deductions—we don't know what has been [123] paid or anything about it. We would like a statement to that effect.

Mr. Kay: We will give a list of what bills Mr. Paddock has paid.

The Court: Well, Mr. Kay, the Court feels that Mr. Paddock has paid the sum of \$200.00 for the month of December, therefore, he should pay then a sum of \$550.00 to bring it up to \$750.00. I don't remember how much in November——

Mr. Kay: I don't want to argue with the Court at all, but may I merely point out again that he has actually paid \$500.00 for the month of December. He paid \$200.00 in cash and \$300.00 in bills which she would have had to pay if he handed her \$500.00. I appreciate Your Honor's feeling that he should pay the sum of \$750.00, but what I was trying to get up to was the \$750.00 without actually making it \$1,000.00.

The Court: That is right. The Court appreciates that fact, Mr. Kay, but on the other hand the plaintiff has been accustomed to this type of living for over a period of time and until the final determination is made by the Court, the Court feels that the defendant has the duty and obligation to maintain her in that same capacity.

Mr. Kay: There is limit of ability.

The Court: Yes.

Mr. Kay: I don't know what—their unpaid accounts and one thing and another are rather substantial amounts, comparing [124] that with cash in the bank. Let's not get beyond Mr. Paddock's present ability to pay.

The Court: Very well, the Court agrees with counsel in that respect. The Court also feels that for the month of November, to bring it up to the \$750.00, that amount which he did not pay for the month of November should be paid upon these bills, which the Court feels they should be paid at the present time. Then for the month of December, by itself, he should pay the balance of the \$750.00 minus \$200.00.

Mr. Kay: Very well, Your Honor.

The Court: Now, that is a little involved, do counsels parties understand?

Mr. Davis: I think so.

The Court: Very well.

The Clerk: How much again was Theresa Shop?

The Court: \$100.00. This case will be continued until the report of the Master and the Court would urge counsel and the parties to cooperate with the Master so an early determination can be made of this matter and, Mr. Kay, if you have a strong feeling as to the law on this case—you desire to present a brief?

Mr. Kay: Oh, I am going to present a brief, Your Honor.

The Court: The Court would like to have it at an early date.

Mr. Kay: I can't promise to work on Christmas day.

The Court: The Court said "an early date" and the books are not going to be closed until 31st of December, therefore, the [125] Court would like to have it by the 5th of January.

Mr. Kay: Very well, Your Honor.

[Endorsed]: Filed Jan. 25, 1954.

137,156.24 Assets
49,765.20 Lia
 87,391.04
~~77,391.04~~

Deft 2
Passbook
 12
Passbook
 Subscribed
 No. G-8926

~~10,000~~

Mrs P

	HP	Mrs. Pad,	Total
Drawing Acct.	<u>1645 97</u>	<u>16,520.27</u>	<u>18,166.24</u>
del. to Cap-	8400.00	8400.00	16,800.00
for Hdt of remaining op.	<u>54,378.64</u> <u>62,778.64</u>	<u>34,378.64</u> <u>42,778.64</u>	<u>88,757.28</u> <u>105,557.28</u>
Balance	61,132.67	26,258.37	

M. P. O'Keefe
 Receipts

[Endorsed]: No. 14877. United States Court of Appeals for the Ninth Circuit. Harold D. Paddock, Appellant, vs. Florence Paddock, Appellee. Transcript of Record. Appeal from the District Court for the District of Alaska, Third Division.

Filed: September 20, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14877

HAROLD D. PADDOCK, Appellant,

vs.

FLORENCE PADDOCK, Appellee.

STATEMENT OF POINTS RELIED UPON
FOR REVERSAL

Comes now the Appellant, Harold D. Paddock, and presents to the above entitled Court, his Statement of Points Relied Upon for Reversal in the above entitled cause:

1. The opinion of the Court, the Findings of Fact and Conclusions of Law and the Decree were signed prior to the defendant having rested his case, and this matter was called to the attention of the Court by a Motion to re-open the case and to set

aside all previous orders, and this Motion was erroneously overruled.

2. The Court was specifically requested to set aside its opinion, Findings of Fact and Conclusions of Law and the Decree, for the reason that they are premature, inequitable, unjust, unreasonable and oppressive as against the defendant, Harold D. Paddock, the Appellant here.

3. That the opinion, Findings of Fact and Conclusions of Law and Decree are based upon a theory of partnership in the business known as Paddock's Paint and Furniture Store, when in truth and in fact, there was no partnership and no proof of partnership, that the property all belonged to Harold D. Paddock before he married the plaintiff, and continued to belong to him at all times, and that the oral finding of the Court that there was a partnership between the parties is not supported by any evidence; is against the clear weight of the evidence, and is against the laws of the Territory of Alaska.

4. That the Court erred further in that the Findings of Fact and Conclusions of Law conflict with the Opinion filed October 8, 1954, and therefore the Findings of Fact and Conclusions of Law were evidently signed by inadvertence and mistake, and it was error on the part of the trial court to refuse to set them aside and correct them.

5. The Court erred in finding in its opinion on page 2 thereof, that both plaintiff and defendant devoted their full time in the development of the

business, because there is no substantial evidence to that effect, and there is plenty of competent evidence against such a finding, and that such finding is contrary to the greater weight of the evidence, and not supported by any evidence.

6. That the Court further erred in finding that each party is entitled to one-half of the real and personal property, because the finding is contrary to law, contrary to the evidence, contrary to equity and justice, and against the greater weight of the evidence.

7. The Court erred further in finding that the defendant's investment in the business prior to the time plaintiff married him was \$10,000.00, when the undisputed evidence showed a greater amount, and this finding should have been to the effect that the defendant owned Lot Two (2) and the East one foot of Lot Three (3) in Block 39, in the original Townsite of Anchorage, Alaska, and also owned the property across the street therefrom, known as the Sunshine Market, prior to his marriage to the plaintiff, as all of the evidence shows that fact to be true.

8. The Court erred in not giving this real property last above described to the defendant free and clear of any claim of the plaintiff.

9. The Court further erred in its opinion filed October 8, 1954, giving the plaintiff \$700.00 a month salary for working in the furniture store for the entire year of 1953, when the evidence showed she did not work there during that period at any time.

10. The Court erred in that, after it ordered

three appraisers to be chosen and a decision and appraisal reached, which decision and appraisal would be final, and before this decision was reached, the court signed the purported Findings of Fact and Conclusions of Law and Decree, over the objections of the defendant.

11. The Court further erred in its finding that the plaintiff is entitled to receive from the defendant \$500.00 per month for temporary support from January, 1954 until October 31, 1954, this being inequitable and unfair, due to the other findings in the opinion and the testimony before the court.

12. The Court erred in making Finding of Fact No. 7, for the reason that the same is inequitable, not supported by competent evidence, and is based upon the theory of partnership existing between the plaintiff and the defendant and is contrary to good conscience, law and equity.

13. The Court erred in making Finding of Fact 8, for the reason that the same is against the evidence in the case, is inequitable, unfair and clearly against the law in this case.

14. The Court erred in making Conclusion of Law No. 5, for the reason it is contrary to law, contrary to equity and good conscience.

15. The Court erred in making Conclusion of Law No. 6, on the last page thereof, for the reason there is no evidence to support such a Conclusion of Law, no finding of fact based upon any competent evidence to give the court any reason to make such a Conclusion of Law.

16. The Court erred in making Conclusion of Law found in Paragraph 3 of the Decree; that the same is erroneous, is unsupported by the evidence, is against the Laws of the Territory of Alaska, and contrary to all equity in the matter.

17. The Court erred in rendering and signing a decree based upon the erroneous findings of fact and Conclusions of Law.

Respectfully submitted,

BELL, SANDERS & TALLMAN,

/s/ By BAILEY E. BELL,

Attorneys for Appellant

Acknowledgment of Service attached.

[Endorsed]: Filed November 25, 1955. Paul P. O'Brien, Clerk.

No. 14,877

United States Court of Appeals
For the Ninth Circuit

HAROLD D. PADDOCK,

vs.

FLORENCE PADDOCK,

Appellant,

Appellee.

BRIEF OF APPELLANT.

BAILEY E. BELL,

WILLIAM H. SANDERS,

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FILED

JUN -8 1956

PAUL P. O'BRIEN, CLERK



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United States Court of Appeals For the Ninth Circuit

HAROLD D. PADDOCK,

Appellant,

VS.

FLORENCE PADDOCK,

Appellee.

BRIEF OF APPELLANT.

I.

JURISDICTION.

The jurisdiction of the District Court was invoked under the act of June 6, 1900, C. 786, Section 4, 31 Statutes 322, as amended, 48 U.S.C.A., Section 101. The jurisdiction of the Court of Appeals rests on Section 1291, of the new Federal Judicial Code, and Federal Rules of Civil Procedure.

II.

JUDGMENT BELOW.

A judgment was entered in the District Court at Anchorage, Alaska, on the 22nd day of December, 1954

(TR 31), based upon Findings of Fact and Conclusions of Law, filed on the same day, which resulted from a trial held exactly one year earlier, namely on December 22, 1953.

III.

STATEMENT OF FACTS.

In the year 1936, the Appellee herein, Florence Paddock, went to work for the Appellant, Harold Paddock, answering the telephone in his paint store business in Anchorage, Alaska. (TR 97.) The Appellee had two small children of approximately one and three years of age. She was caring for her children alone, with no mention appearing in the record as to the reason why the Appellee's former husband was not assisting in the support of his children.

This employee-employer relationship between Appellee and Appellant continued for a period of something less than two years, when it was ended by the marriage of the Appellee and the Appellant, in January of 1938. (TR 3.) The Appellee entered the marriage with little or no money of her own (TR 106), and also brought the added liability of two small children of her own who, at the time of the marriage, were approximately three and four years of age. (TR 74.)

The Appellant proceeded to make a home for the Appellee and her two small children, and did, over the years, succeed in establishing a nice home for his family. (TR 121.) The two children were never adopted by the Appellant, but were raised, supported

and schooled by the Appellant, with the children even using his name. (TR 141.)

At the time of the marriage, in 1938, the Appellant owned the business known as Paddock's Paint Store, which, along with the value of the real property and other property of the Appellant, gave the Appellant an estimated net worth of Fifteen Thousand Dollars (\$15,000.00) to Twenty Thousand Dollars (\$20,000.00). (TR 129.) This was in 1938. The net worth of the business alone had increased to Eighty-nine Thousand Two Hundred Sixty-four Dollars and Sixty-nine Cents (\$89,264.69) of the approximate time that the divorce action brought herein was tried. (TR 42.)

There were no children born to this marriage and the Appellant and Appellee continued to live together until October of 1952, when they separated. (TR 25.) On July 23, 1953, the Appellee filed her complaint for divorce, alleging incompatibility. (TR 3.) The Appellant filed an answer and counter-claim on November 20, 1953, asking for a divorce on the grounds of incompatibility and alleging misconduct on the part of the Appellee. (TR 5.) On the same date, namely November 20, 1953, the Appellant filed a motion for temporary restraining order and for order to show cause, and an affidavit in support of the motion and the order to show cause and temporary restraining order. (TR 8-11.) The order to show cause and temporary restraining order was signed by the judge of the District Court. On November 24, 1953, the Appellee filed her answer to the counter-claim, denying any misconduct on her part. (TR 12.) On December 22,

1953, the case came on for trial before the Honorable J. L. McCarrey, Jr., District Judge for the Third Division of Alaska. During the course of the proceedings in this case, the Court appointed a Master to make an accounting of the property of the Appellant and Appellee. (TR 72.) Arrangements were also made for other accountants to determine the values of the properties involved herein and reports were submitted to the Court by accountants George R. Jones and W. P. Odom of Anchorage. (TR 41-51.) On October 8, 1954, the District Court filed a memorandum opinion wherein appraisers were instructed to deduct from the plaintiff's, Mrs. Paddock's, interest in and to the business of the Appellant the sum of Thirty Thousand Dollars (\$30,000.00). (TR 21.) Then on December 22, 1954, exactly one year after the trial of the action herein, the District Court filed Findings of Fact and Conclusions of Law and a Decree in this case. (TR 23-36.) By the Decree, the Appellee, Florence Paddock, was awarded the family home and furnishings. This home was appraised by one of Appellee's own witnesses at the value of Eighteen Thousand Five Hundred Dollars (\$18,500.00) to Twenty Thousand Dollars (\$20,000.00) for the building and land (TR 121), and with the furnishings appraised at from Two Thousand Dollars (\$2,000.00) to Two Thousand Five Hundred Dollars (\$2,500.00). (TR 122.) This appraisal would give a minimum valuation of Twenty Thousand Five Hundred Dollars (\$20,500.00) for the house, land and furnishings by the addition of the two lowest estimates. The Decree awarded the home to the Appellee upon a valuation of Twenty Thousand Dol-

lars (\$20,000.00) and allowed the Appellant the sum of Ten Thousand Dollars (\$10,000.00) for the value of his business at the time that he married the Appellee. Thus, under the terms of the Decree, the Appellant would be allowed Thirty Thousand Dollars (\$30,000.00) to offset the value of the house and the valuation of his business, and the rest of the property would be split equally except for the individual drawings of the parties during the year.

The split of the property ordered by the Court appears to be an attempt to make a straight partnership split of the property after allowing the Appellant the sum of Ten Thousand Dollars (\$10,000.00), which was the valuation of his business at the time that he married the Appellee, which said valuation was given by the District Court. The Court also indicated in its Findings of Fact as follows:

“V. That prior to the marriage of the parties, the defendant Harold D. Paddock was operating a certain business and had an investment at that time in such business in the amount of \$10,000.00.” (TR 25.)

No allowance was made for any increase in value due to the natural appreciation, although the Court had indicated that he would do so. (TR 131.)

In the accountings, consideration was given to the drawings of the parties, which amounted to Sixteen Thousand Five Hundred Twenty Dollars and Twenty-seven Cents (\$16,520.27), for Mrs. Paddock in 1953, and One Thousand Six Hundred Forty-five Dollars and Forty-seven Cents (\$1,645.47) for Appellant.

(TR 46, 93.) It was admitted that Thirteen Thousand Dollars (\$13,000.00) was drawn by Mrs. Paddock in cash. (TR 170.) But no explanation was given as to why she needed so much money and still ended up the year owing approximately Two Thousand Dollars (\$2,000.00) (TR 171), when her home was paid for.

After the trial of the case, the Appellant, through substituted attorneys, filed a Motion to Reopen the Case and to Set Aside All Previous Orders Made. This was filed on January 26, 1954, argued on June 25, 1954, and denied on July 28, 1954. After Findings and Decree were filed, the Appellant duly filed a Motion for a new trial. This Motion was denied on June 24, 1955, and a Notice of Appeal filed on July 5, 1955, with an Amended Notice of Appeal filed on July 14, 1955.

IV.

SUMMARY OF ARGUMENT.

A.

The opinion of the Court, the Findings of Fact and Conclusions of Law and the Decree were signed prior to the defendant having rested his case, and this matter was called to the attention of the Court by a Motion to re-open the case and to set aside all previous orders, and this Motion was erroneously overruled.

The Court was specifically requested to set aside its opinion, Findings of Fact and Conclusions of Law and the Decree, for the reason that they are premature, inequitable, unjust, unreasonable and oppressive as

against the defendant, Harold D. Paddock, the Appellant here. (Points 1 and 2.)

B.

That the opinion, Findings of Fact and Conclusions of Law and Decree are based upon a theory of partnership in the business known as Paddock's Paint and Furniture Store, when in truth and in fact, there was no partnership and no proof of partnership, that the property all belonged to Harold D. Paddock before he married the plaintiff, and continued to belong to him at all times, and that the oral finding of the Court that there was a partnership between the parties is not supported by any evidence; is against the clear weight of the evidence, and is against the laws of the Territory of Alaska. (Point 3.)

C.

That the Court erred further in that the Findings of Fact and Conclusions of Law conflict with the Opinion filed October 8, 1954, and therefore the Findings of Fact and Conclusions of Law were evidently signed by inadvertence and mistake, and it was error on the part of the trial court to refuse to set them aside and correct them. (Point 4.)

D.

The Court erred in finding in its opinion on page 2 thereof, that both plaintiff and defendant devoted their full time in the development of the business, because there is no substantial evidence to that effect, and

there is plenty of competent evidence against such a finding, and that such finding is contrary to the greater weight of the evidence and not supported by any evidence.

That the Court further erred in finding that each party is entitled to one-half of the real and personal property, because the finding is contrary to law, contrary to the evidence, contrary to equity and justice, and against the greater weight of the evidence. (Points 5 and 6.)

E.

The Court erred further in finding that the defendant's investment in the business prior to the time plaintiff married him was \$10,000.00, when the undisputed evidence showed a greater amount, and this finding should have been to the effect that the defendant owned Lot Two (2) and the East one foot of Lot Three (3) in Block 39, in the original Townsite of Anchorage, Alaska, and also owned the property across the street therefrom, known as the Sunshine Market, prior to his marriage to the plaintiff, as all of the evidence shows that fact to be true.

The Court erred in not giving this real property last above described to the defendant free and clear of any claim of the plaintiff. (Points 7 and 8.)

The Court further erred in its opinion filed October 8, 1954, giving the plaintiff \$700.00 a month salary for working in the furniture store for the entire year of 1953, when the evidence showed she did not work there during that period at any time. (Point 9.)

G.

The Court erred in that after it ordered three appraisers to be chosen and a decision and appraisal reached, which decision and appraisal would be final, and before this decision was reached, the court signed the purported Findings of Fact and Conclusions of Law and Decree, over the objections of the defendant. (Point 10.)

H.

The Court further erred in its finding that the plaintiff is entitled to receive from the defendant \$500.00 per month for temporary support from January, 1954 until October 31, 1954, this being inequitable and unfair, due to the other findings in the opinion and the testimony before the court. (Point 11.)

I.

The Court erred in making Findings of Fact No. 7, for the reason that the same is inequitable, not supported by competent evidence, and is based upon the theory of partnership existing between the plaintiff and the defendant and is contrary to good conscience, law and equity. (Point 12.)

J.

The Court erred in making Finding of Fact 8, for the reason that the same is against the evidence in the case, is inequitable, unfair and clearly against the law in this case.

The Court erred in making Conclusion of Law No. 5, for the reason it is contrary to law, contrary to equity and good conscience.

The Court erred in making Conclusion of Law No. 6, on the last page thereof, for the reason there is no evidence to support such a Conclusion of Law, no finding of fact based upon any competent evidence to give the court any reason to make such a Conclusion of Law.

The Court erred in making Conclusion of Law found in Paragraph 3 of the Decree; that the same is erroneous, is against the Laws of the Territory of Alaska, and contrary to all equity in the matter.

The Court erred in rendering and signing a decree based upon the erroneous findings of fact and Conclusions of Law. (Points 13, 14, 15, 16, and 17.)

V.

ARGUMENT.

- A. 1. THE OPINION OF THE COURT, THE FINDINGS OF FACT AND CONCLUSIONS OF LAW AND THE DECREE WERE SIGNED PRIOR TO THE DEFENDANT HAVING RESTED HIS CASE, AND THIS MATTER WAS CALLED TO THE ATTENTION OF THE COURT BY A MOTION TO REOPEN THE CASE AND TO SET ASIDE ALL PREVIOUS ORDERS, AND THIS MOTION WAS ERRONEOUSLY OVERRULED.
2. THE COURT WAS SPECIFICALLY REQUESTED TO SET ASIDE ITS OPINION, FINDINGS OF FACT AND CONCLUSIONS OF LAW, AND THE DECREE, FOR THE REASON THAT THEY ARE PREMATURE, INEQUITABLE, UNJUST, UNREASONABLE AND OPPRESSIVE AS AGAINST THE DEFENDANT, HAROLD D. PADDOCK, THE APPELLANT HERE.
(Points 1 and 2.)

The trial of this case on December 22, 1953, was handled for the Appellant by Mr. Wendell Kay, of Anchorage. At the end of the trial, there was an understanding that Mr. Kay would present a Brief because of certain issues of law that had not been cleared up during the trial. (TR 175-176.) The brief was never written and presented by Mr. Kay, and shortly after that, the Appellant substituted other attorneys for Mr. Kay. Then, before any further action had been taken by any of the parties or the Court, Appellant's attorneys filed a Motion to Reopen the Case and to Set Aside All Previous Orders Made, on the 25th day of January, 1954. (TR 15.)

This motion to reopen the case, etc. offered additional evidence to the Court of the Appellee's misconduct. (TR 15.) In addition to the misconduct of the Appellee, the Appellant also offered to show the Court the true value of all the property belonging to

the defendant. This particular item was an extremely important one, since most of the difficulty of this case has resulted from the unfair distribution of the property to the Appellee without allowing the Appellant the proper allowances for his hard-earned savings and work prior to marrying the Appellee. In addition to the question concerning the property, the Appellant also offered to show that there was never any semblance of partnership between the parties. This, too, was an extremely important point, since it appeared that the Court based his opinion, at least in part, upon a finding that a partnership existed between Appellant and the Appellee. The Appellant also offered to show that the Appellee had done little to advance the business, and in fact had been detrimental to the operation of his store. Another point that the Appellant offered to make was to show the Court the actual value of the properties that Appellant owned prior to his marriage to the Appellee. This, too, was an extremely important point, since the Court had indicated to Appellant's counsel that he would take into consideration the increase in value of the property, but when it came to the awarding of the property, the Court completely failed in this respect. That the Court intended to take into consideration the increase in value of the property is borne out by the following discussion at Page 131 of the transcript:

“Mr. Kay. It seems to me it is important in this respect: To bring out the chronology of the acquisition of this property. From my point of view, I would like to show that it was actually acquired by Mr. Paddock very early in the mar-

riage, either before or at the time of it, or a year or so after the marriage. Now surely we are not going to—I don't wish to debate the point, but the point to me is what has happened since then has largely been, at least as far as the increase in value of this property, has just been normal increase of all property in the Anchorage area by reason of the growth of the area.

Court. Wouldn't the Court take that into consideration?"

From the foregoing it appears that the Court very definitely intended to make allowances for the natural appreciation in value of the property of the Appellant. However, the Court allowed Mr. Paddock the sum of Ten Thousand Dollars (\$10,000.00) for the value of his property acquired prior to his marriage, but stated in its Findings that he had an investment of Ten Thousand Dollars (\$10,000.00) prior to his marriage. This sum did not even come up to the amount that the evidence would show Mr. Paddock was worth at the time of his marriage, much less make any allowance for the increase in value of his property. (TR 129.)

In all fairness, the Court should have considered the natural increase in value of property in the Anchorage area and given the Appellant the benefit of this increase. The logic of this argument can be seen by speculating as to the results if the reverse had been followed. That is, to attempt to value the property acquired since marriage by the value of the property bought, at the time it was bought, and then adding these sums together. The result would be very small,

since the main piece of property which consists of the present location of the Paddock Paint and Furniture Store, cost Twenty Thousand Dollars (\$20,000.00) (TR 130), and the home lot cost Eight Hundred Dollars (\$800.00). (TR 131.) Thus, by using such an unrealistic approach, we get an unrealistic result. If the Court were going to award the Appellant the value of his property acquired prior to marriage, the Court should also take into consideration the increment in value due to the natural appreciation in value.

B. THAT THE OPINION, FINDINGS OF FACT AND CONCLUSIONS OF LAW, AND DECREE ARE BASED UPON THE THEORY OF PARTNERSHIP IN THE BUSINESS KNOWN AS PADDOCK'S PAINT AND FURNITURE STORE, WHEN IN TRUTH AND IN FACT, THERE WAS NO PARTNERSHIP AND NO PROOF OF PARTNERSHIP, THAT THE PROPERTY ALL BELONGED TO HAROLD D. PADDOCK BEFORE HE MARRIED THE PLAINTIFF, AND CONTINUED TO BELONG TO HIM AT ALL TIMES, AND THAT THE ORAL FINDING OF THE COURT THAT THERE WAS A PARTNERSHIP BETWEEN THE PARTIES IS NOT SUPPORTED BY ANY EVIDENCE; IT IS AGAINST THE CLEAR WEIGHT OF THE EVIDENCE, AND IS AGAINST THE LAWS OF THE TERRITORY OF ALASKA. (Point 3.)

That the Court seems to have treated this matter as a partnership accounting appears quite evident from the Court's statement at Page 103 of the transcript, as follows:

"The Court. Mr. Kay, the Court will point out to you that the Court considers marriage a partnership and, therefore, based upon statements of Judge Dimond and Judge Folta and experience of this Court, it is, therefore, the Court's feeling

that any improvements to the contrary will be a waste of time.”

This discussion continued on as follows (TR 103-104):

“Mr. Kay. Let me get the Court’s thinking straight. The mere fact that the people are partners constitutes the wife a partner in business?”

The Court. No, the mere fact they are married and in this case (47) particularly where they have worked together.”

Earlier in the proceedings, Appellee’s attorney took the position that the business of Appellant and Appellee was conducted as a partnership and that the parties were partners. At Page 67 of the transcript the Appellee’s attorney inferred that it was a partnership while discussing the preliminary proceedings in this case in his opening statement.

“Mr. Davis. . . . I would like to point out to the Court, that under order of this Court, *although the parties have conducted that business as a partnership for many many years last past . . .*” (TR 67) (Emphasis supplied.)

Appellant’s attorney objected to any attempt to show that the business of the parties to this action was a partnership (TR 68), but Appellee’s attorney insisted on trying to show that it was. The transcript shows that the Appellee did not even know what a partnership was. On direct examination at Page 83 of the transcript the following took place:

“Q. All right, did you actually—Mrs. Paddock, did you and Mr. Paddock actually conduct this business over all these years as partners

Mr. Kay. I object as leading and calls for conclusion of (24) the witness.

The Court. Objection sustained.

Mr. Davis. As being leading or calling for conclusion?

The Court. Both. I am not sure that the witness knows what a partnership is.

Q. (By Mr. Davis.) Mrs. Paddock, do you know what a partnership is?

A. Well, I figure if two people have worked in business long enough—even if—like the income tax, it was written down as a partnership.

Q. Did you file, as a matter of fact, partnership income tax returns?

A. Yes."

It appears that the Appellee was not too well informed of the status of the business, for under cross-examination the following took place (TR 100):

"Q. Now, are you sure or aware of the difference between a joint tax return filed by husband and wife and a full partnership tax return, Mrs. Paddock?

A. I mean, Mr. Godchaux has all of those—I mean, it is right down there. I took it for granted it was a partnership.

Q. Well, then you don't know whether or not the firm actually filed partnership tax returns or not, do you?

A. Well, I believe they did.

Q. But do you know?

A. Well, no unless I look at it again. I can't say positively that they did."

In any event, there appears to be no evidence that a partnership existed between the parties to this action,

other than that the Appellant and Appellee were married. The Appellee even admitted that there was no oral or written partnership agreement of any kind at Page 101 of the transcript, as follows:

“Q. In other words, then the answer is that you and Mr. Paddock have never had either a written or oral partnership agreement of any kind?

A. No, that is right.”

Despite the fact that there was no showing whatsoever that a partnership existed between the Appellant and the Appellee, the Court apparently divided the property of the parties upon a partnership basis, giving an equal interest to Appellant and Appellee after deducting the original investment by Appellant. The Court also found that the original investment of the Appellant in his business was Ten Thousand Dollars (\$10,000.00). (TR 25.) As indicated in the previous argument, the figure here is not supported by the evidence.

Even if there had been a specific agreement between the Appellant and the Appellee, written or oral, there still could not have been a valid partnership relationship between the two, for the reason that a husband and wife cannot be partners to each other in Alaska. This follows the old common law rule which is set forth in 26 Am. Jur. at Page 853-854, as follows:

“At common law, there can be no partnership between spouses, and a married woman cannot become a member of a partnership of which her husband is also a member, since the legal existence

of the wife merges in that of the husband and they cannot contract with each other.”

The foregoing is the common law rule, and in view of Section 2-1-2 ACLA (1949), the common law rule will have to be deemed to be the law of Alaska. Section 2-1-2 ACLA (1949) is quoted:

“So much of the common law as is applicable and not inconsistent with the Constitution of the United States or with any law passed or to be passed by Congress or the Legislature of Alaska is adopted and declared to be law in the Territory of Alaska.”

It is true that we have Married Women’s Property Acts in Alaska, with Section 21-2-10 ACLA (1949) giving a wife power to contract or incur liabilities, as follows:

“Contracts may be made by a wife, and liabilities incurred, and the same enforced by or against her to the same extent and in the same manner as if she were unmarried.”

It should be noted at this time that this particular Section is identical to Section 2997 of Hill’s Annotated Laws of Oregon, 1892, and it was under an interpretation of this particular Section that the Washington State Supreme Court held that it was impossible for a husband and wife, in Alaska, to enter into a partnership relationship. In this case, *Elliott v. Hawley, et ux.*, 76 P. 93, the Court also construed several of the Married Women’s Property Acts which were applicable to Alaska at that time. These were Sections of Hill’s Annotated Laws of Oregon.

In the case of *In Re Dixon et al.*, 18 Fed. 2d 961, the Court, in construing certain Married Women's Property Acts, stated:

"... Under the Michigan statute, it has been held that a married woman may become a member of a partnership with others than her husband (*Vail v. Winterstein*, 94 Mich. 230, 53 N.W. 932, 18 L.R.A. 515, 34 Am. St. Rep. 334), but that she cannot form a partnership with her husband which will render her liable for the payment of partnership obligations (*Artman v. Ferguson*, 73 Mich. 146, 40 N.W. 907, 2 L.R.A. 343, 16 Am. St. Rep. 572). In the case of *Artman v. Ferguson*, it is said:

'It is the purpose of these statutes to secure to a married woman the right to acquire and hold property separate from her husband, and free from his influence and control, and if she might enter into a business partnership with her husband it would subject her property to his control in a manner wholly inconsistent with the separation which it is the purpose of the statute to secure, and might subject her to an indefinite liability for his engagements. A contract of partnership with her husband is not included within the power granted by our statute to married women. This doctrine was laid down in *Bassett v. Shepardson*, 52 Mich. 3, 17 N.W. 217, and we see no reason for departing from it. . . .'

Another jurisdiction that has refused to permit wives to become partners of their husbands is that of Maine. In *Haggett v. Hurley, et ux.*, 40 Atlantic 561, the following headnote sets forth the rule:

“The common law disabilities of a married woman have not been so far removed by statute as to empower her to form a business partnership with her husband.”

Michigan, too, follows the old common law rule that husband and wife could not enter into a partnership and in *Dombrowski v. Gorecki*, 289 N.W. 293, the Court follows the same reasoning as in *Dixon et al.*, 18 Fed. 2d 961 (*supra*).

The question has also been discussed by the Massachusetts Court in *Edgerly v. Equitable Life Assurance Society*, 191 N.E. 415 and the opinion reported at Page 417 could well be applied to the Alaska Statutes on partnership and Married Women's Property Acts. The statement of the Court is quoted:

“There is nothing in the uniform partnership statute as adopted in this Commonwealth (St. 1922, c. 486, see now G. L. (Ter. Ed.) c. 108A), which changed the previously existing law with respect to the incapacity of a married woman to make a contract a partnership with her husband. That statute provides in part that a ‘partnership is an association of two or more persons.’ G.L. (Ter. Ed.) c. 108A, Sec. 6. But it neither expressly nor impliedly confers capacity to make such a contract upon an individual who, by the law governing capacity, is incapable, because of infancy, coverture, or any other reason, from making a contract. The statute does not purport to deal with capacity to contract and the provision therein that it shall be so interpreted and construed as to effect its general purpose to make uniform the law of those states which enact it.’

G.L. (Ter. Ed) c. 108A, #4(4) does not require uniformity in law outside its scope and affecting it only incidentally. Though apparently neither the word 'persons' nor anything else in the uniform partnership statute by its own force precludes a married woman from making a contract of partnership with her husband, if this was permitted by other provisions of law, that statute must be applied in harmony with the existing provisions of law which render her incapable of so doing."

Thus, since Alaska has also adopted the uniform partnership act, (Section 28-1-1 ACLA 1949), the same reasoning as in the foregoing paragraph should be applied in this case. That is, the uniform partnership act does not change the previously existing law with respect to the incapacity of a married woman to enter into a partnership with her husband, and there is nothing in the Alaskan Married Women's Property Acts which would tend to change the law on this particular point, and it has been pointed out above in *Elliott v. Hawley, et ux.*, 76 Pac. 93, that the present section removing the wife's incapacity to contract, did not permit her to enter into a partnership relationship with her husband.

The Supreme Court of the State of Washington has also held that married women's property act, which permitted the wife to maintain an action against her husband for the possession of property and which permitted her to contract the same as if she were unmarried, did not allow her to enter into a contract of partnership with the husband. See *Board of Trade of*

City of Seattle, et al. v. Hayden, 30 Pac. 87; *Didier, et al. v. Pardue and Pardue*, 144 So. 762.

In *Fuller and Fuller Company v. McHenry*, 53 N.W. 896, Wis. 1892, the statute involved gave the wife the right to make contracts in regard to her separate estate, and the wife in this particular case attempted to form a partnership with her husband. At Page 898 the Court stated:

“... Had it been shown, however, that Mrs. Hanson had a separate estate, we think that the partnership agreement between her and her husband (if any, for there is little more than a scintilla of evidence of one) must be regarded as void, and that the business in question was the sole business of her husband, and the Plaintiff's claim is his sole and individual debt. The purpose and policy of the statute concerning the rights of married women, in our judgment, forbid the formation of a continuing business engagement between husband and wife, which shall produce a community of interest, liability, and profit, in which the husband would have, as partner, a right of control and management of the separate estate of the wife, so that he could sell and convert it into money from time to time, draw the firm moneys from the bank, and collect notes and bills receivable and dispose of the proceeds, in the payment of his debts or otherwise, without her knowledge or consent. The making of such an engagement by the wife might be, if put in execution, a conversion of her separate estate into that of her husband. Certainly, it is easy to understand that, with his influence and control as husband, such result would be almost inevitable. The principal

purpose of the statute is to give the wife the power and rights of a feme sole as to her separate property, free 'from the disposal of her husband' and 'not liable to his debts' . . ."

Another case on the same point is *Gilkerson-Sloss Commission Company v. Salinger*, 19 S.W. 747, wherein the Court stated as follows at Page 748:

"In view of the legal unity and identity of husband and wife at common law, and the wife's incapacity to sue the husband at law, and the rulings of our court upon the incapacity of the wife to contract with her husband, we are of the opinion that the wife, under our statute, cannot form a partnership with her husband. As the credit in this case was given to the firm of which she could not be a member, and as she is sued as surviving partner of that firm, there can be no recovery against her in this action."

The Court here also had to construe a Married Women's Property statute, namely Section 4625 of Mansfield's Digest.

In view of the foregoing, it seems abundantly clear that a wife cannot be a partner with her husband in Alaska, and that any distribution of the property of the Appellant herein, based upon a theory of partnership between him and the Appellee is erroneous.

C. THAT THE COURT ERRED FURTHER IN THAT THE FINDINGS OF FACT AND CONCLUSIONS OF LAW CONFLICT WITH THE OPINION FILED OCTOBER 8, 1954, AND THEREFORE THE FINDINGS OF FACT AND CONCLUSIONS OF LAW WERE EVIDENTLY SIGNED BY INADVERTENCE AND MISTAKE, AND IT WAS ERROR ON THE PART OF THE TRIAL COURT TO REFUSE TO SET THEM ASIDE AND CORRECT THEM. (Point 4.)

In the Opinion dated October 8, 1954, the Court stated (TR 21):

“The appraisers are hereby instructed to first deduct from the plaintiff’s interest in and to said business the sum of \$30,000.00 which is the amount found to be that interest the defendant had in and to said business before he married the plaintiff and the value of Lot 3, of Block 108, of the Original Townsite (supra).”

The foregoing paragraph from the Opinion is inconsistent with the Court’s paragraphs 2 and 3 of the Conclusions of Law (TR 28). This inconsistency hasn’t been set aside or disposed of by motions or orders, but is still continuing to be in effect as if no such inconsistency existed. If the referred to paragraph in the Opinion were to be given effect, a much more equitable result would follow. The difference in results is clearly set forth by Mr. W. P. Odom, accountant, in his report filed February 21, 1955 at Page 50 of the transcript.

Appellant submits that the Opinion should have been followed and that it was error for the Court to enter Findings of Fact and Conclusions of Law and a Decree that was inconsistent with the Opinion.

D. THE COURT ERRED IN FINDING IN ITS OPINION ON PAGE 2 THEREOF, THAT BOTH PLAINTIFF AND DEFENDANT DEVOTED THEIR FULL TIME IN THE DEVELOPMENT OF THE BUSINESS, BECAUSE THERE IS NO SUBSTANTIAL EVIDENCE TO THAT EFFECT, AND THERE IS PLENTY OF COMPETENT EVIDENCE AGAINST SUCH A FINDING, AND THAT SUCH FINDING IS CONTRARY TO THE GREATER WEIGHT OF THE EVIDENCE, AND NOT SUPPORTED BY ANY EVIDENCE.

THAT THE COURT FURTHER ERRED IN FINDING THAT EACH PARTY IS ENTITLED TO ONE-HALF OF THE REAL AND PERSONAL PROPERTY, BECAUSE THE FINDING IS CONTRARY TO LAW, CONTRARY TO THE EVIDENCE, CONTRARY TO EQUITY AND JUSTICE, AND AGAINST THE GREATER WEIGHT OF THE EVIDENCE. (Points 5 and 6.)

The evidence in this case is undisputed that the Appellee had two very young children of her own at the time that she married the Appellant. These children were the Appellee's by a former marriage, and although the Appellant provided a home for the children, he had never adopted the children, and therefore was never legally responsible for them. (TR 141.) The evidence even shows that the Appellant hired housekeepers to help take care of the children while the children were young, (TR 140) and obviously the mother of the children would have to spend some time caring for them so that she could not have spent as much time working in the business as did the Appellant. It should also be pointed out that the contributions of the Appellee to the business of the Appellant were minor and unnecessary and, at the most, could be valued no more than the services of any other employee. In fact, had the Appellee stayed at home more and taken care of her two young children this divorce might never have occurred. The following will

point out some of the difficulties that have resulted from the Appellee's failure to stay home and take care of her children. See Tr. 139-140:

"Q. Now, Mr. Paddock, how did it happen that a mother with two relatively small children was spending time down at the store rather than being home taking care of the house?

A. Well, didn't like to stay home, maybe. I don't know.

Q. Just like to take part in the business, is that the idea?

A. Yes, I'd say so.

Q. Was that particularly at your request that she came down and participated in the business as she has?

A. No.

Q. Have you ever suggested that you preferred, that she might put her time to better advantage to take care of the home than the business?

A. Yes.

Q. As a matter of fact, that has been one of the sources of irritation that led up to this incompatibility, has it not?

A. That is right.

Q. Do you feel that Mrs. Paddock has contributed, let's put it this way—strike that—in what proportion, being fair to both of you, to the best of your ability, in view of the situation, in what proportion do you honestly feel that Mrs. Paddock has contributed to the rather pleasant financial position in which you find yourself today? I mean, by participating in the business what do you feel she has contributed to it?

A. Not any more than the salary of anybody else."

On the same page, namely 140, of the transcript, the following indicates one of the results of Mrs. Paddock's insisting on working at the store:

“Mr. Davis. I am sorry, Mr. Paddock, I am not understanding what you are saying.

A. I said in the stages of when the kids were younger that we hired housekeepers to take care of the kids, to come in during the day and Mrs. Paddock took care of them at night.”

It should also be pointed out that the duties of Mrs. Paddock in the paint store were minor and were such as could have been taken care of by any other employee. The following testimony will bear this out (TR 134):

“Q. What was the nature of her duties at that time, Mr. Paddock?

A. Answering the telephone mainly and taking appointments for contract work and sell paints, mark prices, etc. or show wallpaper.

Q. Just a general job of employee in a paint store or small store, is that correct?

A. That is right.

Q. Now, was there any difference—change in those duties after your marriage?

A. No.”

It should also be noted that when Mrs. Paddock went to work for the Appellant she did so for \$40.00 a month. Since she continued to do the same type of work after she got married, it seems reasonable to assume that the value of her services would still be approximately the same. This \$40.00 a month which amounted to \$480.00 a year, the amount that Mrs.

Paddock first got when going to work as an employee, is a far cry from the \$16,000.00 that she drew in 1953 out of Appellant's business. (TR 93.)

In awarding each party one-half of the real and personal property, the Court does not appear to have made an attempt to distinguish separate property from that of the jointly owned property. The difficulty that results from the failure of the Court to consider the separate property of the Appellant is due to the fact that such separate property would increase in value with the general economic changes in the locality. Here, however, the Court has placed an arbitrary value upon the property of the Appellant and no allowance made for any appreciation in value. The lower Court should have separated the property which was separate property of the Appellant in its Findings of Fact and Conclusions of Law and Decree and if the separate property were then awarded to the Appellant, he would, of course, also get the natural increase due to appreciation in value.

E. THE COURT ERRED FURTHER IN FINDING THAT THE DEFENDANT'S INVESTMENT IN THE BUSINESS PRIOR TO THE TIME PLAINTIFF MARRIED HIM WAS \$10,000.00, WHEN THE UNDISPUTED EVIDENCE SHOWED A GREATER AMOUNT, AND THIS FINDING SHOULD HAVE BEEN TO THE EFFECT THAT THE DEFENDANT OWNED LOT TWO (2) AND THE EAST ONE FOOT OF LOT THREE (3) IN BLOCK 39, IN THE ORIGINAL TOWNSITE OF ANCHORAGE, ALASKA, AND ALSO OWNED THE PROPERTY ACROSS THE STREET THEREFROM, KNOWN AS THE SUNSHINE MARKET, PRIOR TO HIS MARRIAGE TO THE PLAINTIFF, AS ALL OF THE EVIDENCE SHOWS THAT FACT TO BE TRUE.

THE COURT ERRED IN NOT GIVING THIS REAL PROPERTY LAST ABOVE DESCRIBED TO THE DEFENDANT FREE AND CLEAR OF ANY CLAIM OF THE PLAINTIFF. (Points 7 and 8.)

There is no dispute in this case that the Appellant owned the going paint store in the City of Anchorage, including the property upon which the buildings were located, at the time that the Appellee first went to work for him, and that the Appellant also owned this at the time that the Appellee married the Appellant. The estimate of the value of the Appellant's business prior to the time that the Appellee married him was given at from \$15,000.00 to \$20,000.00. (TR 129.) And although there is no dispute that the Appellee claimed an interest in the property of the Appellant prior to the time that she married him, the Court refused to award this separate property to the defendant, the Appellant herein. The failure of the Court to award to the Appellant the property that was his prior to the time that the Appellee married him and the failure of the Court to allow the Appellant more than \$10,000.00 for the value of his business which was owned and operated prior to the time that the Appellee came

into the picture was erroneous, and was such an abuse of discretion as to constitute reversible error.

The discretion of the Court in making property awards is not arbitrary, and the rule is fairly well stated in *Stewart v. Stewart*, 242 Pac. 947, where the opinion at Page 949 is quoted as follows:

“It is now the settled law and practice of this Court that, while a large discretion is vested in the Trial Courts in applying the provisions of the foregoing statute and in making distribution of property, yet such discretion is not an arbitrary one but is a sound legal discretion, and is subject to a review by this Court. . . .”

The foregoing rule is supported by *Swanda v. Swanda*, 232 Pac. 62, as expressed by the following headnote:

“Where, in an action by a wife against her husband to obtain a divorce and alimony, the Court finds that the wife is not entitled to a divorce or alimony, and both are refused, the Court is authorized, under Section 505, Compiled Laws 1921, to make such order as may be proper for the equitable division of the property then owned by them, taking into consideration the time and manner of its acquisition.”

The rule is also fairly clearly set forth in *Shaw v. Shaw*, 133 Atlantic 248, wherein the Court stated at page 249:

“In fixing the amount of the award, the Court is vested with a wide, but judicial discretion. If that discretion is neither withheld or abused, the decision, on general principles, is not subject to a

review. But if the Trial Court declines to consider a material fact, well proved, or makes what is manifestly an unjust award, this Court will correct the error. That facts covered by the requests referred to were material and should have been found. The refusal of the Court to comply with the requests amounted to a ruling that they were not material, which would be error."

Another case holding that the division of property should be equitable is *Tackett v. Tackett*, 129 S.W. 2d 574, which held in part:

"Award of trial Court allowing divorced wife all of personalty in satisfaction of her alimony claim was erroneous, since trial court should have made an equitable division of personalty, between husband and wife, with not more than one-half being set aside for use of wife."

For holding wherein the Appellate Court reversed the lower Court because of the lower Court's abuse of discretion in the property settlement, see *Van Horn v. Van Horn*, 119 Pac. 2d 825, which essentially held as follows:

"Irrespective as to whether divorce is granted to husband or to wife, the wife is entitled to a fair 'equitable division' of the property acquired during marriage, which does not necessarily mean an equal division of the property."

It thus appears that a fair and equitable division of the property is a majority rule in divorce actions. However, this raises the question of what property is involved in the fair and equitable division. The Ap-

pellant herein submits that a fair and equitable division of property of himself and the Appellee does not include the separate property of the parties which was separate at the time of the marriage. For a case setting forth the rule quite clearly, see *Colvin v. Colvin*, 81 Pac. 2d 305, wherein the Court stated at Page 306:

“... None of the property was acquired by the joint industry of husband and wife. We do not deem it of any value to discuss the various allegations and claims as to the difference in the financial status. We think this matter has been thoroughly covered by the Court in *Hughes v. Hughes*, 131 Okla. 33, 367 Pac. 620, in which this Court said: ‘Where a divorce is granted the husband because of the fault of the wife, the Court should make a fair and equitable division of the property acquired by the joint industry of the parties during marriage, but in such case no division should be made of the separate property of the husband acquired prior to the marriage.’ See, also, *Finnel v. Finnell*, 113 Okla. 164, 204 Pac. 62, and *Stocker v. Stocker*, 172 Okla. 64, 47 Pac. 2nd 107.”

The Appellant submits that the equitable division of the property would have awarded the property to him which he owned prior to the time that he married the Appellee, or in the alternative, to award an amount that would be equal to his interest in the business owned prior to the time of his marriage, plus the increase in value which was due to the natural increase of property values in the area over the years. The actual distribution ordered by the Court was an abuse of discretion and erroneous.

F. THE COURT FURTHER ERRED IN ITS OPINION FILED OCTOBER 8, 1954, GIVING THE PLAINTIFF \$700.00 A MONTH SALARY FOR WORKING IN THE FURNITURE STORE FOR THE ENTIRE YEAR OF 1953, WHEN THE EVIDENCE SHOWED SHE DID NOT WORK THERE DURING THAT PERIOD AT ANY TIME. (Point 9.)

At Page 21 of the transcript the Court found that both plaintiff and defendant were entitled to a monthly wage of \$700.00 for the entire year of 1953 and that the plaintiff and defendant should be credited or debited such a sum in accordance with their drawings for that year, etc.

Such a finding is obviously erroneous, since there is no evidence to show that the Appellee worked in the store for the year of 1953, and could, at most, be entitled only to support money and not to salary for working in the store. The Appellee alleged in her complaint that she and the Appellant were separated in the month of October, 1952, and that they have been separated since that date. And, in any event, if the Appellee were working in the store for the full year of 1953, part of the work would be in direct violation of the order of the lower Court, for the reason that an Order to Show Cause and a Temporary Restraining Order was filed on November 20, 1953, which enjoined the Appellee from entering on or about the premises of the Appellant's business. Mrs. Paddock's claims would have to be something other than for salary for working in the furniture store.

G. THE COURT ERRED IN THAT, AFTER IT ORDERED THREE APPRAISERS TO BE CHOSEN AND A DECISION AND APPRAISAL REACHED, WHICH DECISION AND APPRAISAL WOULD BE FINAL, AND BEFORE THIS DECISION WAS REACHED, THE COURT SIGNED THE PURPORTED FINDINGS OF FACT AND CONCLUSIONS OF LAW AND DECREE, OVER THE OBJECTIONS OF THE DEFENDANT. (Point 10.)

In the Court's Opinion (TR 20) the Court stated:

“ . . . Such interest of the plaintiff shall be determined by three appraisers, one appraiser to be appointed by the plaintiff and one by defendant, and these two in turn to appoint a third and the decision reached by any two of the three appraisers shall be final . . . ”

This Opinion was filed on October 8, 1954. However, it does not appear that any appraisal was filed by such appraisers before the filing of the Findings of Fact and Conclusions of Law and Decree by the Court on December 22, 1954. It is true that reports were filed, but after the Court had already signed the Decree. This Decree made the determination that the Appellant was only to get \$10,000.00 credit for the value of his business prior to the time that he married the Appellee, and thus the appraisers never had a chance to appraise the value of the business before the marriage.

It should also be pointed out that the Court under Rule 53 of the Federal Rules of Civil Procedure referred the accounting to a Master. (TR 64, 72.) But it does not appear that the Master gave a report as to the value of Appellant's property prior to the time of his marriage at any time before the Court signed the Findings of Fact and Conclusions of Law and Decree.

H. THE COURT FURTHER ERRED IN ITS FINDING THAT THE PLAINTIFF IS ENTITLED TO RECEIVE FROM THE DEFENDANT \$500.00 PER MONTH FOR TEMPORARY SUPPORT FROM JANUARY 1, 1954, UNTIL OCTOBER 31, 1954, THIS BEING INEQUITABLE AND UNFAIR, DUE TO THE OTHER FINDINGS IN THE OPINION AND THE TESTIMONY BEFORE THE COURT. (Point 11.)

The Appellant was ordered to pay the sum of \$500.00 per month from January 1, 1954 to October 31, 1954 in the Conclusions of Law and by the Decree. However, the Court ordered this payment even after the Court had already decided to give the Appellee half of the property with the exception of the \$10,000.00 to the Appellant. Undoubtedly the Court took into consideration the fact that the two daughters of the Appellee were attending school in the States which required certain sums for their tuition, board, etc. in making the awards. The Court even ordered certain payments made to cover tuition and board for the girls. However, the Appellant never adopted these children and therefore was not legally responsible for any of their education, maintenance and support. (TR 173.)

Another point that the lower Court apparently ignored in ordering the Appellant to make payments of \$500.00 per month support was that if the parties were separated through the fault of the wife the Appellant was not duty bound to pay for her support. The rule is well stated in 26 Am. Jur. at Page 939, Sec. 340 of Husband and Wife, as follows:

“No duty of a husband to support his wife exists, as a general rule, where they are living apart through her fault. Nor does such duty exist, al-

though a husband has not requested his wife to live with him, where her unyielding attitude is and has been that she will not do so, where he abandons her because of her adultery, or where she is guilty both of adultery and of abandoning him. The duty of the husband to support the wife ceases upon her abandonment of him without justification; . . .”

For cases in support of this proposition, see *Maschauer v. Downs*, 53 App. D.C. 142, 289 Fed. 540, 32 ALR 1461; *Mirizio v. Mirizio*, 242 N.Y. 74, 150 N.E. 605, 44 ALR 714; *Richardson v. Stuesser*, 125 Wis. 66, 103 N.W. 261.

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- I. THE COURT ERRED IN MAKING FINDING OF FACT NO. 7, FOR THE REASON THAT SAME IS INEQUITABLE, NOT SUPPORTED BY COMPETENT EVIDENCE, AND IS BASED UPON THE THEORY OF PARTNERSHIP EXISTING BETWEEN THE PLAINTIFF AND THE DEFENDANT AND IS CONTRARY TO GOOD CONSCIENCE, LAW AND EQUITY. (Point 12.)

The Finding of Fact No. 7 is clearly in error, which is probably due to the fact that the Court was assuming that a partnership existed between the parties to this action. There has been no attempt on the part of the Appellee to show that all of the property listed in the Finding of Fact No. 7 was acquired by the parties after the marriage, but on the contrary the Appellee admits that the Appellant owned certain property in the City of Anchorage at the time that they were married. The admissions on this particular point can be found throughout the record and the Appellant's ownership of certain real estate has never

been denied. This particular Finding again tends to show the inequitable determination of the property disposition of the parties to this action.

J. THE COURT ERRED IN MAKING FINDING OF FACT 8, FOR THE REASON THAT THE SAME IS AGAINST THE EVIDENCE IN THE CASE, IS INEQUITABLE, UNFAIR AND CLEARLY AGAINST THE LAW IN THIS CASE.

THE COURT ERRED IN MAKING CONCLUSION OF LAW NO. 5 FOR THE REASON IT IS CONTRARY TO LAW, CONTRARY TO EQUITY AND GOOD CONSCIENCE.

THE COURT ERRED IN MAKING CONCLUSION OF LAW NO. 6, ON THE LAST PAGE THEREOF, FOR THE REASON THERE IS NO EVIDENCE TO SUPPORT SUCH A CONCLUSION OF LAW, NO FINDING OF FACT BASED UPON ANY COMPETENT EVIDENCE TO GIVE THE COURT ANY REASON TO MAKE SUCH A CONCLUSION OF LAW.

THE COURT ERRED IN MAKING CONCLUSION OF LAW FOUND IN PARAGRAPH 3 OF THE DECREE; THAT THE SAME IS ERRONEOUS, IS UNSUPPORTED BY THE EVIDENCE, IS AGAINST THE LAWS OF THE TERRITORY OF ALASKA, AND CONTRARY TO ALL EQUITY IN THE MATTER.

THE COURT ERRED IN RENDERING AND SIGNING A DECREE BASED UPON THE ERRONEOUS FINDINGS OF FACT AND CONCLUSIONS OF LAW. (Points 13, 14, 15, 16 and 17.)

The above points have been discussed, at least in part, earlier in this brief. We need only touch upon these points briefly at this time.

Finding of Fact No. 8 is in conflict with the Opinion of the Court filed earlier in this action. It is this Finding which also determines the amount to be allowed to Appellant herein for his business owned prior to his marriage, which, as pointed out above, is so inequitable as to constitute an abuse of discretion and reversible error.

Conclusion of Law No. 5 concerns the split of the property equally between the parties and, as pointed out above, results in the inequity in this case.

The remaining points appear to be covered, in part, above.

VI.

CONCLUSION.

In conclusion we must say that the gross inequities of the lower Court decision have resulted from misunderstandings and errors on the part of the trial Court, and the inequities are of such a nature as to require the correction of same by this Court. We sincerely request that the lower Court decision be at least modified, if not set aside.

Dated, May 28, 1956.

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Attorneys for Appellant.

No. 14,877

IN THE

United States Court of Appeals
For the Ninth Circuit

HAROLD D. PADDOCK,

VS.

FLORENCE PADDOCK,

Appellant,

Appellee.

On Appeal from the District Court for the District of Alaska,
Third Division.

BRIEF OF APPELLEE.

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FILED

AUG 10 1956

PAUL P. O'BRIEN, CLERK

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Volume 3, Appeal and Error, Section 971, pages 531-533.	18, 19
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No. 14,877

IN THE

**United States Court of Appeals
For the Ninth Circuit**

HAROLD D. PADDOCK,

Appellant,

VS.

FLORENCE PADDOCK,

Appellee.

On Appeal from the District Court for the District of Alaska,
Third Division.

BRIEF OF APPELLEE.

I.

**STATEMENT RELATING TO PLEADINGS
AND JURISDICTION.**

This appeal is being prosecuted by the appellant (defendant in the lower court) from a certain judgment and decree entered by the District Court for the District of Alaska at Anchorage, Alaska, on the 22nd day of December, 1954. Jurisdiction of the District Court is based on Title 48 USCA 101 (53-1-1 ACLA 1949) and according to the provisions of Chapter 5 of Title 56 ACLA 1949, pertaining to actions for divorce. Practice and procedure in the District Court is controlled by the Federal Rules of Civil Procedure.

Jurisdiction of this Court to review the judgment of the District Court is conferred by New Title 28 USC Sections 1291 and 1294 and is governed in procedural matters by the Federal Rules of Civil Procedure.

II.

STATEMENT AS TO PLEADINGS AND PROCEEDINGS AND FACTS.

This action was instituted by the plaintiff, Florence Paddock, (Appellee herein) on July 23, of 1953. The complaint (R 3-5), in brief, alleges residence of plaintiff, that the parties to the action were married on January 14, 1938, that there was an incompatibility of temperament existing between the parties so that it was impossible for them to continue living together as husband and wife in a normal marital relationship and alleged that there was a question of property rights presented to the Court for determination.

Defendant's answer and counterclaim (R 5-7), filed November 20, 1953, admitted the residence of the plaintiff in Alaska, that the parties were married as alleged by the plaintiff, that no children had been born the issue of the marriage and that a question of property rights was presented to the Court for determination. The answer admitted that the parties were incompatible, denied that the plaintiff had attempted to resolve the differences between the parties and denied that plaintiff was without fault. In his counterclaim defendant alleged his residence in the Territory, the marriage of the parties, that no children had been

born the issue of the marriage and that there were conflicting interests between the parties, with reference to property acquired during the marriage, which should be determined by the Court. All of those allegations of the counterclaim were admitted by the plaintiff in her answer to the counterclaim filed November 24 of 1953. (R. 12-13.) The defendant then set out his claim as to the incompatibility of temperament existing between the parties and claimed that the plaintiff had been extravagant and uncooperative "in the recent course of their married life" and that plaintiff had harassed and injured defendant in the conduct of his business and that the plaintiff had been guilty of misconduct with other persons and that the defendant at all times had conducted himself as a reasonable person and was without fault in the matter. (R 7.) These allegations of the counterclaim were denied by the plaintiff in her answer to the counterclaim. In such answer to the counterclaim the plaintiff also alleged that the trouble between the parties arose from the misconduct of the defendant continuing over a period of several years. (R 13.) Each party prayed for a divorce and that the property rights of the parties be adjudged and determined by the Court and for such other and further relief as to the Court might seem just and equitable. (R 5 complaint; R 7 answer and counterclaim; R 13 answer to counterclaim.)

The matter was set for trial for December 22, 1953. Both parties were present in Court, together with their respective attorneys. (R 63.) The Court at that time referred the matter to a master for an accounting between the parties. (R 64.) The master reported and

his report was considered by the Court in arriving at its decision. (R 23, Findings and Conclusions; R 32, decree.)

At the outset of the trial and by stipulation of the parties, plaintiff's exhibit 1, appraisal of property by Gene Silberer of Norene Realtors, plaintiff's exhibit 2, tax assessment valuation of property as of October, 1952, and plaintiff's exhibit 3, financial statement of Paddock Paint and Furniture Store as of December 31, 1952, prepared by Mr. Godchaux, the company auditor, were admitted into evidence. (R 71 as to exhibit 1 and R 72 as to exhibits 2 and 3.) Plaintiff's exhibit 4, a tentative balance sheet and profit and loss statement for Paddock Paint and Furniture Store for the first eleven months of 1953 was admitted into evidence without objection during the course of the trial. (R 144.)¹

Plaintiff testified at some length concerning the relationship of the parties and the incompatibility of temperament between the parties and concerning the property acquired and held by the parties. Plaintiff was extensively cross-examined concerning the property matters. (R 74 to 117.)

Earl E. Silberer, otherwise known as Gene Silberer, was examined and cross-examined concerning the valu-

¹As will appear from the records in the hands of the Court, appellant herein designated the entire original files and records, including all exhibits, as the record on appeal. The certificate of the clerk (R 62) shows that all original papers, including exhibits, were certified and sent to the Court of Appeals. For some reason appellant has not seen fit to include the master's report or the exhibits as part of the printed record.

ations of the home property with relation to the exhibit previously introduced. (R 117 to 123.)

Harold D. Paddock was examined and cross-examined extensively concerning the property owned by him at the commencement of the marriage and the property acquired by the parties after the marriage and as to the work done by the respective parties in furtherance of the business known first as Paddock's Paint Store and subsequently as Paddock's Paint and Furniture Store. (R 124 to 165.) The defense rested its case (R 165) and Mrs. Paddock was called in rebuttal. The Court continued the matter for receipt of the report of the master and authorized defendant to present a brief if he cared to do so. (R 175.)²

Defendant released Mr. Kay who had handled the matter through the trial as attorney for the defendant and Mr. Bell became defendant's attorney. On January 26, 1954, Mr. Bell, on behalf of defendant, moved to reopen the case and to set aside all previous orders made. (R 15-16.) This motion was argued to the Court by both parties (R 17) and was denied by the Court on July 28 of 1954. (R 18.)

The Court rendered its written memorandum of opinion in the matter on October 8, 1954 (R 18-22) and entered its Findings of Fact and Conclusions of Law and Decree on the 22nd day of December of 1954. (R 23-36.) Defendant thereupon filed motion for new trial. (R 36-41.)

²Defendant's brief was filed February 2, 1954, and is part of the original record in the hands of the Court but is not included as part of the printed record.

In accordance with the Findings of Fact and Conclusions of Law the decree provided that the business known as Paddock's Paint and Furniture Store, together with the property on which such business was conducted, should be appraised by three appraisers, one selected by plaintiff and one selected by the defendant and one selected by the two other appraisers. Plaintiff selected George R. Jones. Defendant selected his accountant, W. P. Odom, and the two appraisers jointly selected William Renfro of the First National Bank of Anchorage. These appraisers valued the real estate upon which the business had been conducted at a price of \$55,000.00 (R 43), as compared with a value of \$70,000.00 in the Silberer appraisal (exhibit 1) and \$59,350.00 appraisal by the City of Anchorage for tax purposes (exhibit 2). The two appraisers selected by the parties agreed upon the share of the interest of the respective parties in and to the business and the business property according to the Court's decree (R 46; 49), but disagreed as to whether the interest should be determined by the provisions of the decree or by the provisions of the Court's opinion. The appraiser appointed by defendant contended that the interest of the respective parties should be determined according to the terms of the opinion and contended that the opinion differed from the decree and, thereupon, additional oral evidence was taken by the Court concerning the interest of the respective parties in the business and in the business property. (R 56 and R 58.) The two appraisers at that time each presented written statements of their position, in addition to their oral testimony. The statement by Mr. Odom was introduced as de-

defendant's exhibit "Y" and the statement of Mr. Jones was introduced as plaintiff's exhibit "Z".³

The position of Mr. Odom, on behalf of the defendant, appears at pages 47 to 50 of the record and a letter from Bell & Sanders, defendant's attorneys, to the Court concerning the Odom report, appears at pages 51 and 52 of the record. A letter from Mr. Odom to defendant's attorneys, Bell & Sanders, concerning the same matter, appears at pages 52 to 54 of the record. The Court entered its oral opinion concerning the various accountings of the two appraisers on March 11, 1955. The minute order concerning the decision is found at page 54 of the record and transcript of the opinion is found at pages 55 to 57 of the record.

On March 15, 1955, the Court denied motion for new trial and a minute order of such denial appears at page 55 of the record. Thereupon, the Court, on the 24th day of June of 1955, entered formal order denying defendant's motion for new trial and finding that the determination of the interests of the respective parties in the business and in the business property reported by Mr. Jones on behalf of the plaintiff was in accordance with the Court's intention in his opinion and ordered that the Findings of Fact and Conclusions of Law and Decree, entered and adopted by the Court on December 22, 1954, carried out the intention of the Court in its opinion and adopted and reaffirmed such Findings of Fact and Conclusions of Law and Decree in the matter. (R 57-59.)

³Defendant's exhibit "Y" is made a part of the printed record. Plaintiff's exhibit "Z" is not made a part of the printed record as such, but is reproduced at pages 41 through 46 of the record.

Defendant then filed a notice of appeal, followed by an amended notice of appeal, found at pages 60 and 61, respectively, of the record and put up supersedeas bond. The defendant has not complied with the Findings and Decree in any respect and has paid nothing to the plaintiff toward support or property settlement, or otherwise, since partial compliance with the Court's order made in open court at the close of the hearing on December 22, 1953 (R 175), except that defendant for a period of time continued to pay the utility bills and taxes with reference to the home property occupied by the plaintiff. The defendant, Harold D. Paddock, at all times has been and still is in complete possession of the business and of all the property, with the exception of the home property and the lot next to the home property which is being purchased on contract. Any and all rents of the real properties held by the plaintiff and any and all profits of the business have been retained by the defendant.

III.

QUESTIONS FOR DETERMINATION.

Appellant in this matter has filed 17 points relied upon for reversal. Although the notice of appeal is general, apparently appellant has raised no question concerning the propriety of the granting of a divorce to the plaintiff but has limited his argument to the actions of the Court with reference to the property settlement between the parties and with reference to

the allowances made to the plaintiff by the Court by way of temporary support money and by way of a salary for the year 1953.

Appellant's objections are based on the claims that the Court erred in entering any Findings of Fact and Conclusions of Law and in rendering its decree because it is claimed that such actions by the Court were premature. This contention is based (1) upon the contention that appellant, as defendant, had not closed his case and that the Court should have allowed appellant to reopen his case to present further evidence in certain respects. (2) Upon the ground that the Court, in making the division of the property, made its Findings on the basis of insufficient evidence to support such Findings and that the property division was inequitable, unfair and contrary to good conscience. This latter contention is based on appellant's claim that the Court treated the business operated by the parties prior to their separation as a partnership, whereas, appellant claims that the business and the property all belong to him as an individual and that he was entitled upon dissolution of the marriage to all of the property acquired both before and after the marriage.

Appellee believes that all of the objections made by appellant can and should be determined on four questions as follows:

1. Were the Findings of Fact and Conclusions of Law and the Decree entered by the Court premature?
2. Did the Court err in refusing to allow defendant to reopen his case on motion made more than a month after the close of the trial?

3. Did the Court err in the division ordered of the property of the parties?

4. Did the Court err in allowing a salary to the plaintiff for the year 1953 and in allowing support to the plaintiff for the first ten months of the year 1954?

IV.

SUMMARY OF ARGUMENT.

Appellant has based his argument on a false premise as to the record on his claim that he had not rested his case and that, accordingly, the Findings and Conclusions and Decree of the Court were premature. The record shows appellant had rested his case.

Appellant, inferentially at least, claims the Court should have granted his motion to reopen the case to accept additional evidence. Appellant made no showing as to how he expected to prove the additional matter and gave no reason as to why the additional evidence was not offered at the trial and offered nothing at all to show that the additional evidence would be material or helpful to the Court. Appellant made his motion to reopen to the trial Court prior to the ruling of the Court. The motion was argued to the trial Court and was overruled by the trial Court. Granting or denying the motion was in the discretion of the trial Court. Appellant has not claimed or shown any abuse of discretion by the trial Court in overruling such motion. In the absence of a showing of abuse of discretion this Court will not review the action of the trial Court as to the motion.

The claim of appellant that the Court decided this case on a theory of partnership is not sustained by the evidence. Partnership was not pleaded or proved and the Court made no findings or conclusions pertaining to a partnership and the decree made no reference to a partnership or judgment concerning a partnership. The trial Court by law was required to settle the property rights of the parties and that he did acting within the bounds of legal discretion and according to the evidence before the Court.

The testimony as to the efforts of the respective parties in the business operated by them and as to the investment of appellant in the business prior to marriage was disputed. The Court made findings on those points. The findings are supported by substantial evidence. They will not be set aside on appeal unless clearly erroneous. No showing has been made that the findings were clearly erroneous or erroneous at all. Under the Court Rules the Appellate Court will give the findings of the lower Court the benefit of a presumption of validity and the burden is upon appellant to show that such findings were clearly erroneous.

The Court did not err in granting to plaintiff \$700.00 per month for 1953. Whether it be called wages or support makes no difference. Appellant kept the books. He charged everything conceivable against the drawing account of appellee but charged only a nominal amount against his own drawing account. All of appellant's normal living expenses for 1953, except his food, were charged against the business and not against his drawing account. Since the Court allowed

appellant a salary of \$700.00 a month, appellant profited by the difference between his drawings and \$8,400.00, while actually getting his living out of the business. Appellant has no just complaint as to the allowance made.

Appellant has shown no error in the temporary support of \$500.00 per month allowed appellee for the first ten months of 1954. Admittedly the allowance was in the power and discretion of the Court. No abuse of discretion has been shown.

On the whole record it appears that the Court tried to divide the property accumulated by the parties equally between the parties, giving appellant the benefit of what he had before the marriage. On the entire record the division was fair and equitable and according to law.

The trial Court speaks through its findings of fact and conclusions of law and decree. The opinion of the Court cannot be used to modify or control the findings of fact and conclusions of law and decree if there is a conflict between the opinion and the formal findings and conclusions and decree. In this case the Court at the request of appellant took additional evidence, both oral and documentary, and specifically found that the Findings of Fact and Conclusions of Law incorporated its intent expressed in the opinion.

V.

ARGUMENT.

Appellee believes that all of the questions for determination here, as previously set forth, must be answered in the negative and that it will be demonstrated conclusively that the District Court for the District of Alaska committed no error with reference to this cause and that the decree of such court should be affirmed by this Court.

At the outset appellee thinks it would be wise to point out several general propositions as it appears clear to attorneys for the appellee that appellant has based a large portion of his argument on premises not supported by the record and on a claim that the trial Court was acting under a misapprehension of the law when, in fact, the record shows conclusively that the Court was not so acting. While it will be necessary to answer appellant's various contentions in some detail as to each of his arguments it seems to appellee's attorneys that a certain amount of confusion may be avoided by pointing out the false premises under which appellee believes appellant is proceeding prior to answering appellant's arguments in more detail.

Section A of appellant's argument is based upon the premise that defendant had not rested his case and that the Court should have allowed him to reopen his case to put in certain additional evidence and that therefore the Findings of Fact and Conclusions of Law and Decree were premature. This contention seems to be based on the theory that at the close of the evidence Mr. Kay, as attorney for the defendant (ap-

pellant herein) was to file a certain brief which he did not file, that before the brief was presented defendant moved to reopen the case, that such motion was denied and that the Court erred in not allowing appellant to present additional evidence.

At the close of the trial on December 22 of 1953, the defendant did rest his case. (R 165.) It is true that Mr. Kay, as defendant's attorney, during the course of the trial, had suggested that he desired to submit a memorandum on the point of whether or not a husband and wife could enter into a technical legal partnership (R 104) and the Court at the close of the proceedings on December 22, 1953, allowed Mr. Kay to and including the 5th day of January 1954 to file his proposed brief. (R 176.) The matter was not held open for additional evidence. Any desire of the defendant to present further testimony was an afterthought.

As to any claim that the Findings of Fact, Conclusions of Law and Decree were premature it should be noted that the motion to reopen the case was filed in January of 1954. (R 16.) It was argued by respective counsel on June 25, 1954 (R 17) and was overruled by the Court on July 28, 1954. (R 18.) The Court's opinion on the case was filed on October 8, 1954, and the Findings and Conclusions and Decree were not signed or entered until December 22, 1954, nearly five months after the order denying motion to reopen the case.

A large portion of appellant's brief, particularly Section B, is devoted to the proposition that a husband and wife cannot enter into a technical business part-

nership and that the Court handled the matter as a partnership and that therefore the Court committed error. With reference to this matter appellee calls attention of the Court to the fact that the pleadings do not allege a partnership and that there is no evidence at all that the parties ever had or ever thought they had a technical partnership and that the Court did not treat the matter as a partnership. The whole theory of appellant concerning this partnership proposition apparently arises from statements made by Mr. Davis, one of appellee's attorneys, in his opening statement to the Court at the time of the trial on December 22, 1953, (R 66) wherein Mr. Davis, after stating that a considerable portion of the property consisted of a going business which could not be divided without serious detriment to both parties stated that the Court must so arrange the property settlement that the business would go to one or the other of the parties as a going business. With reference to that matter (R 67) Mr. Davis stated that, although the parties had conducted the business as a partnership for many years, that Mrs. Paddock had been excluded from the business premises. Mr. Kay then in his opening statement to the Court stated that he believed the evidence would show that the business had never been conducted as a partnership, had never been a partnership and was not at that time a partnership. (R 68.) On questioning Mrs. Paddock, Mr. Davis asked her if the business had been conducted as a partnership. Mr. Kay objected and the Court sustained the objection. (R 83.) The question wasn't answered. Appellee made no claim that the business was in fact a technical partner-

ship. There is evidence that the business was conducted as a partnership would have been conducted. Among other things, it appears from the evidence that the business books were set up to show a drawing account on behalf of the two parties. Actually, as will appear from the entire record, plaintiff's claim was that she, as a wife, and particularly as a wife who had worked in the business and who had helped develop the business, was entitled to one-half interest in the property acquired by the parties, whereas, appellant claimed that all the property was in his name and that, therefore, the wife had no interest in it.

At page 103 of the record the Court sets forth its theory of the relationship between the parties where it stated that the Court considers marriage as a partnership and on page 105 of the record the Court distinguishes between a legal and technical partnership and the rights of the parties to a divorce proceeding. At that point Mr. Kay indicated that he recognized that the rights of the parties on a divorce proceeding are exactly what the Court feels is right and that the Court has almost complete discretion in the matter and that whether a business was conducted as a partnership or as to whether it wasn't would not affect whatever decision the Court might decide to make in a division of the property. Mr. Kay was undoubtedly referring to the provisions of 56-5-13 ACLA 1949, subsection Sixth, governing division of property on divorce actions which reads as follows:

“Sixth. For the division between the parties of their joint property, or the separate property of each, in such manner as may be just, and with-

out regard as to which of the parties is the owner of such property; and to accomplish this end the judgment may require one of the parties to assign, deliver or convey any of his or her real or personal property to the other party; and the provisions of section 55-10-7 of the Compiled Laws of Alaska 1949 shall apply to any such judgment."

There was never any finding by the Court, oral or otherwise, that there was a partnership between the parties. The Court in its decree attempted to divide the property equally between the parties.

In several parts of his argument, particularly in Section C thereof, appellant contends that the opinion of the Court differed from the Findings of Fact and Conclusions of Law and the Decree signed by the Court and that, therefore, the Court must have entered its Findings of Fact and Conclusions of Law by inadvertence and mistake. Whether there is any conflict between the opinion of the Court and the Findings of Fact and Conclusions of Law and the Decree signed by the Court is certainly debatable, but in any event the Court made formal Findings of Fact and Conclusions of Law and appellee believes that such formal acts of the Court are the action of the Court. Insofar as the opinion may be inconsistent with the Findings of Fact and Conclusions of Law and Decree entered, the opinion means nothing. However, in this case, the specific point made by appellant here was called to the Court's attention and argued at length and additional evidence was taken by the Court and the Court, after considering such additional evidence,

made an order in which it specifically found that the Findings of Fact and Conclusions of Law and the Decree theretofore signed and filed by the Court were in accordance with what the Court had intended in its opinion and at that time reaffirmed the Findings of Fact and Conclusions of Law and Decree theretofore adopted. On this record it seems incredible that appellant at this time could claim that the Findings of Fact and Conclusions of Law were evidently signed by inadvertence and mistake.

Appellee will now attempt in some detail to answer the arguments made by appellant in their order.

Section A of appellant's argument embraces points 1 and 2 of appellant's points relied upon for reversal. Appellant claims that he had not rested his case because there was an understanding that Mr. Kay would present a brief on certain issues of law and that appellant's attorney, Mr. Bell, filed a motion to reopen the case and to set aside all orders previously made and that the motion was erroneously overruled.

As previously pointed out by appellee, plaintiff did close his case as the record conclusively shows. Did the Court commit error in refusing to reopen the case at the request of appellant? 3 Am. Jur., Appeal and Error, section 971, has to do with the conduct of a trial and uses the following language:

“The mode of conducting the trial is left almost entirely to the discretion of the trial judge and will not be reviewed by an appellate court in the absence of an abuse of discretion.” (note 17 on page 531, and cases there cited.)

The same work, beginning at the bottom of page 532, under the heading "Order and Terms of Introducing Evidence", uses the following language:

"The order and times of introducing evidence or proof are matters resting in the sound discretion of the trial court and hence will not be reviewed in the absence of an abuse of such discretion. . . . The reopening of a case to receive additional evidence is also a matter within the discretion of the trial court which will not be interfered with on an appeal except for abuse." (note 18 on page 533, and cases there cited.)

See, *Haveman v. Beulow*, Wash., 1950, 217 P. (2d) 313, 19 A.L.R. (2d) 763, 768, where the Court uses the following language:

"The reopening of the case after it has been submitted to the court for decision is within the discretion of the court and its action will not be disturbed unless it clearly appears that such discretion has been abused."

See, also, 53 Am. Jur. under the heading "Trial", section 123, page 109, at the bottom of the page where the following language appears:

"Likewise, the trial court may, in its discretion, decline to reopen the case, and its action will not be disturbed unless there has been an abuse of discretion. . . ." (notes 17 and 18, and cases there cited, including among other cases, *Silkey v. Tiegs*, Ida., 1931, 5 P. (2d) 1049 and *Denman v. Brennamen, et al.*, Okla., 1915, 149 P. 1105.)

In the case of *Horicon v. Langlois's Estate*, Vt., 1949, 66 Atl. (2d) 16, 9 A.L.R. (2d) 195, headnote 7,

page 201, the Court states that a ruling lying in the discretion of the trial Court will, the contrary not appearing by the record, be presumed to have been made in the exercise of discretion.

Appellant here has not attempted to show any abuse of discretion by the Court in failing to reopen the case. He states that in his motion he had offered to produce "*additional evidence*" of appellee's misconduct. As will appear from the record there is no evidence at all of any misconduct on the part of the appellee. Neither is there any showing of any kind as to how or why if the husband had evidence of alleged misconduct of the wife such evidence of alleged misconduct was not presented at the trial of the case. The defendant had pleaded misconduct. Certainly if there had been any misconduct he could and should have shown it at the time of the trial. On the showing made he is not entitled to object because the Court refused to reopen the case to allow him to offer evidence of misconduct. See *Consolidated National Bank v. Pacific Coast SS Company*, Cal., 1892, 30 P. 96, which holds that the trial Court did not abuse its discretion in refusing to reopen the case where no excuse is shown for not having produced the offered evidence at the trial. See, also *In re Wohleber*, Penn., 181 Atl., 474, 101 A.L.R. 829:

"Where the petition and the affidavit raise no new issues and disclose no testimony which could not have been produced by reasonably diligent inquiry at the time of the hearing, denial of a rehearing for the purpose of presenting additional evidence is not an abuse of discretion."

Appellant also claims that in his motion to reopen the case he offered to show the true value of all the property belonging to defendant. As will appear from the record all of the property was appraised by Mr. Silberer. His appraisal was introduced into evidence without objection as plaintiff's exhibit 1. The defendant specifically agreed that such appraisal fairly valued all of the property with the exception of the family home which Mr. Silberer appraised at \$18,500.00 and which appellant claimed was worth in the neighborhood of \$25,000.00. (R 69.) Mr. Silberer was questioned at length by appellant's attorney as to the value of the home and indicated that with the furniture the home might be worth an additional \$2,000.00 to \$2,500.00. (R 122.) Defendant had full opportunity to present any evidence that he desired to present concerning the value of the home, or for that matter the value of any of the other property. Appellee is unable to understand how appellant could claim that the Court erred in not allowing him to introduce additional evidence to show the value of the property.

Appellee also wishes to call the Court's attention to the fact that the appraisal of the store property, more particularly described as Lot 2 and the east one foot of Lot 3 of Block 39, of the Original Townsite of Anchorage, Alaska, and the building located thereon, made by Mr. Silberer and agreed to by appellant as being a fair appraisal for such property, was in the sum of \$70,000.00. The appraisers appointed by the Court valued this property for the purpose of

determining the interest of the appellee at \$55,000.00. Since by the terms of the Court's order appellant retained this property it appears that he received the advantage of \$15,000.00 in purchasing the interest of the appellee in such property. It would seem to appellee that appellant has no right to complain of the action of the Court in not allowing him to put in additional evidence as to the value of the property.

Appellant argues that in his motion to reopen the case he also offered to show that there never was any semblance of partnership between the parties and claimed that this was extremely important since it appeared that the Court based his opinion, at least in part, upon a finding that a partnership existed between appellant and appellee. Appellee has previously pointed out that the partnership question was considered by the Court at the trial of the case and that the Court at that time indicated that he did not consider such question as being of any importance. (R 104-105.) The case was decided strictly on a basis of a property division between husband and wife on divorce of the parties. It was not decided on a partnership theory. Appellant has made no showing as to how any additional evidence concerning partnership, or lack thereof, might have been helpful at all to the Court in deciding this case had the evidence been offered and admitted.

Appellant also claims that in his motion to reopen the case he offered to show that appellee had done little to advance the business and, in fact, had been detrimental to the operation of the store. Appellant

so testified at the trial. (R 133, 140, 151-155.) Appellee fully testified on the matter as well. (R 97-99, 117.) Appellant has shown no reason at all as to how additional evidence would have been helpful in that respect in any manner whatsoever.

In his argument appellant claims that in his motion to reopen the case he offered to show the Court the actual value of the properties that appellant owned prior to his marriage to appellee. Both parties testified at considerable length concerning the properties owned by appellant at the time of the marriage. Appellant testified that at the time of the marriage the net worth of his business was from \$10,000.00 to \$15,000.00. (R 128.) The lower figure was double the value that plaintiff had estimated as the worth of defendant's business at the time of the marriage. In cross-examination when defendant was asked to break down the claimed net worth of his business at the time of the marriage, he came up with the total figure of approximately \$4,000.00. (R 148.) The record discloses that defendant kept books with reference to his business and that such books were available back at least to the year 1938. Plaintiff's counsel asked appellant, at the time of the trial, to produce those books of the business for the years 1937 through 1940, so that the books could be given to Mr. Godchaux, the Master appointed by the Court, with reference to the testimony of defendant as to the value of his business at the time he married the plaintiff early in 1938. (R 149.) The defendant never produced those books. The only reasonable conclusion is that the Court in allow-

ing the defendant \$10,000.00 as the value of his business at the time of his marriage was extremely generous to the defendant. There isn't a shred of evidence anywhere that had the case been reopened that any further evidence could or would have been offered concerning the value of Mr. Paddock's business at the time he married the plaintiff.

Appellant, likewise, complains of the fact that had he been allowed to reopen his case he could have shown that the value of property in the Anchorage area had increased generally since the time of the marriage of the parties. This theory was raised at the time of the trial. (R 131.) Mr. Paddock certainly could have introduced evidence on that point had he cared to do so but he offered no evidence to support that proposition. However, as will appear from the testimony, Mr. Paddock owned no real property at the time of the marriage. According to the undisputed testimony he had entered into a contract to purchase the east twenty-five feet of Lot 9 and the west half of Lot 10, all in Block 29 of the Original Townsite of Anchorage, Alaska, sometime in the year 1937, at and for a total price of approximately \$6,000.00. (R 126, 127.) This property has been known throughout these proceedings as the Sunshine Market property. (R 126.) Mr. Paddock was asked as to whether he paid cash for the property or paid some down with monthly payments on the balance. He said that he had paid partly cash for it and that he didn't recall how much had been paid down. (R 127.) See (R 80) for testimony of appellee as to the

purchase of this property. The property was substantially paid for and title taken to it after the marriage. The division made by the Court was on the basis of the total value of all property owned by the parties at the time of the divorce. There isn't any evidence at all that the Court in making the division didn't take into consideration any increase in the value of any property owned by appellant at the time of marriage. It appears without dispute that all the other real property now owned by the parties was acquired after the marriage and, accordingly, it is difficult to see how the defendant might have been harmed by the action of the Court in denying the motion to reopen the case for this purpose.

As to Section A of appellant's argument, appellee submits that appellant has not shown any abuse of discretion by the trial Court in failing to reopen appellant's case or that findings and conclusions and decree were premature. Appellant has made no case for reversal of the judgment on either of such grounds.

Section B of appellant's argument is to the effect that the opinion of the Court and the Findings of Fact and Conclusions of Law and the Decree of the Court are based upon the theory of partnership and that in truth there was no partnership and that the property all belonged to Harold D. Paddock before he married the plaintiff and continued to belong to him after the marriage and that the oral finding of the Court that there was a partnership between the parties is not supported by the evidence, is against

the clear weight of the evidence and is against the laws of the Territory of Alaska.

Appellant starts out his argument by the statement "that the Court seems to have treated this matter as a partnership accounting appears quite evident from the Court's statement at page 103 of the transcript". As a matter of fact, the Court's statement was exactly to the contrary. Mr. Kay, appellant's attorney, recognized that the Court had complete discretion in dividing property between a husband and wife in a divorce action. (R 105.) The Court did no more than to order a division of the property. As previously pointed out, the parties actually conducted the business in the nature of a partnership, but there was no attempt to prove that there was a technical partnership between the husband and wife and the Court did not treat it as a partnership. Accordingly, all discussion of the law of partnership in the matter is completely beside the point and a waste of time. Even if we concede the law to be as claimed by appellant as to a partnership between a husband and wife the fact remains that under the laws of the Territory of Alaska, the Court in a divorce proceeding has not only the right but the duty to divide the property between the parties as to the Court seems justified from the evidence. It doesn't profit appellant any to claim that he actually owned the property or that it was all in his name because the statute specifically provides that the Court shall divide their joint property, or the separate property of each, in such manner as may be just, and without regard as to which of the parties is the owner of the property. (56-5-13, S.S. 6,

ACLA, 1949, above cited.) Certainly that would seem to be as clear as anybody could desire.

The Court had the duty to divide the property whether jointly owned or separately owned in a just manner and in the exercise of a lawful discretion. He did just that on the basis of the evidence presented. Appellant has claimed that the division was unjust and inequitable and oppressive and not based on the evidence but he has cited no instance and quoted no law to indicate that the Court abused its discretion in any way.

It is claimed by appellant in Section C of his argument that the Findings of Fact and Conclusions of Law adopted by the Court conflict with the opinion rendered by the Court and that, therefore, the Findings of Fact and Conclusions of Law were evidently signed by inadvertence and mistake.

Rule 52, Federal Rules of Civil Procedure, requires the Court in a case tried without a jury to find the facts specially and to state separately its Conclusions of Law. The rule further allows the Court, if it desires so to do, to incorporate its Findings of Fact and Conclusions of Law in its opinion. In the case here under consideration the Court entered an opinion which did not purport to include Findings of Fact and Conclusions of Law and subsequently executed and filed formal Findings of Fact and Conclusions of Law.

Barron and Holtzoff, Federal Practice and Procedure, in section 1128, under discussion of Rule 52, beginning at page 827, uses the following language:

“The trial judge speaks through his findings and judgment. Statements in an opinion which is not regarded or intended as embracing findings of fact and conclusions of law cannot control, modify or impeach the findings or decision.”

See *Brooks Brothers v. Brooks Clothing*, Cal., District Court for California, 1945, 5 Federal Rules Decisions, 14, and the other cases cited in note 93 of the work above described. See, also, *Ohlinger v. United States*, decided by this Court in 1955, 219 Fed. (2d) 310; *Stone v. U. S.*, 164 U.S. 380, which states that the Court’s opinion cannot eke out, control or modify the Court’s findings.

Actually, it is debatable here as to whether there was any inconsistency at all between the opinion of the Court and the Findings of Fact executed by the Court. However, the accountant employed by appellant claimed that there was such inconsistency. Accordingly, at the request of the defendant, the Court took further evidence with reference to this matter and received oral testimony and documentary evidence concerning it. After considering the additional evidence the Court held that the Findings of Fact adopted and filed by it carried out what the Court intended in writing its opinion and by order re-adopted and reaffirmed the findings previously made. (R 59.) Under these circumstances appellee is unable to understand how the appellant in good conscience can at this date claim that the Court must have entered its findings by inadvertence.

The appellant has not had the evidence taken on this supplemental hearing transcribed and such evi-

dence is not part of the record on appeal. Appellee believes that the burden was on appellant to bring up the record on this point if he desired to raised the point and having failed to have the testimony transcribed and made a part of the record, this Court is entitled to consider that the lower Court acted with good and sufficient reason in reaffirming its previous finding and that appellant has no right to object. See Barron and Holtzoff, Federal Practice and Procedure, section 1131, entitled "Presumptions on Appeal", particularly note 11 and cases therein cited where the following language appears:

"Consequently, an appellant seeking to overthrow the findings has the burden of presenting a proper record to the Court of Appeals showing that the evidence compelled a finding in his favor."

See *Jernigan v. Southern Pacific Company*, C.A. 9, 1955, 222 Fed. (2d) 245; *McClyman v. Hamilton*, C.A. 9, 1950, 180 Fed. (2d) 965. Appellant here has not shown anything in his argument to the effect that the evidence compelled a finding in his favor.

Section D of appellant's argument is to the effect that the Court erred in finding that both plaintiff and defendant devoted their full time to the development of the business and that each party is entitled to one-half of the real and personal property belonging to the parties and claims that there is no substantial evidence to support the finding and that there is plenty of competent evidence against the finding and that such finding is contrary to the greater weight of the evidence and is not supported by any evidence

and that such findings are contrary to equity and justice.

In arguing such matter appellant states that appellee had two very young children at the time she married appellant and that appellant never adopted the children and was not legally responsible for them. We suppose that that matter stands undisputed but we fail to see how that is material to the discussion of this point. It seems reasonable to suppose that appellant at the time he entered the marriage knew of the existence of the two children and entered the marriage with the understanding that the children would be brought up as his children. Whether he legally adopted them or not has no particular bearing on the case.

Appellant has shown nothing at all as to how it is claimed that there was no substantial evidence that plaintiff and defendant jointly developed the business or as to any of the competent evidence which appellant claims militates against such findings or as to how such findings are contrary to the greater weight of the evidence. It is argued that since appellee had two small children that obviously she would have to spend some time caring for them so that she could not have spent as much time working in the business as the appellant did. As a matter of fact, the appellee testified that she did contribute equally with defendant and that she did spend as much time in the business as appellant did. (R 117.) The testimony of the parties was oral. The testimony as to how much plaintiff worked in the business was disputed. The

Court had not only the right but the duty to weigh the evidence given by the respective parties and this Court, under the provisions of Rule 52, will not set aside any finding made by the trial Court unless clearly erroneous. In arriving at a decision as to whether the finding is clearly erroneously this Court is to give due regard to the opportunity of the trial Court to judge the credibility of the witnesses. See Barron and Holtzoff, Federal Practice and Procedure, section 1131, "Presumptions on Appeal" above cited where the following language appears:

"On appeal the Appellate Court does not re-try the case. The findings of fact are presumptively correct and will not be set aside unless clearly against the weight of the evidence or based upon an erroneous view of the law. . . . The Appellate Court takes that view of evidence which is most favorable to appellee who prevailed in the trial court. It assumes that all conflicts in the evidence were resolved in favor of the appellee." (Notes 9, 10, 12 and 13 and cases there cited, including several decided by this Court.)

The statement of appellant in his brief that had the appellee stayed at home more and taken care of her two young children this divorce might never have occurred would appear to be pure speculation based on no evidence whatsoever. From the undisputed evidence it appears that the parties got along reasonably well until the children were pretty well grown and the marriage was finally broken up because the defendant failed to stay at home and went his own way without regard at all for the plaintiff. He finally

moved into an apartment of his own, leaving the family home. (R 75, 76, 77, 78, 79.) The evidence shows conclusively that plaintiff did work in the store operated by the family from the time of her marriage up until the month of April of 1953, at which time she quit by mutual agreement of the parties because the incompatibility between the parties was such that they could not be together at the same place without creating an impossible situation. Appellant has shown nothing here to justify this Court in holding that the finding of the trial court was clearly erroneous.

With reference to the last paragraph of that portion of appellant's argument which is denominated "D", appellee believes that the matter has previously been covered. Actually by provisions of the law the Court has discretion to award the separate property of one party to the other party or to divide such separate property. As has previously been shown there actually wasn't any separate property at all.

Section E of appellant's brief is to the effect that the Court erred in finding that the value of defendant's investment in the business prior to the time of the marriage was \$10,000.00, and that the finding should have been to the effect that the defendant owned two specific pieces of property at the time of the marriage and such argument claims that all of the evidence shows that fact to be true.

So far as the property is concerned appellee in her argument has already dealt with the so-called Sunshine Market property, the east twenty-five feet of Lot 9 and the west half of Lot 10 in Block 29 of the

Original Townsite of the City of Anchorage, Alaska. According to the evidence such property was purchased under contract sometime in the year 1937, but how much was paid down and how much was paid later does not appear. Neither does it appear as to whether the purchase was made in December of 1937, one month prior to the marriage of the parties, or in January of 1937, one year before the marriage of the parties, or at some other time in that year. So far as the other property is concerned, being the property we have called Paddock's Paint and Furniture Store property, described as Lot 2 and the east one foot of Lot 3 of Block 39 of the Original Townsite of Anchorage, Alaska, there is no support at all for the statement of appellant in his brief that "there is no dispute in this case that appellant owned the going paint store in the City of Anchorage, *including the property upon which the buildings were located*, at the time that appellee first went to work for him and that appellant also owned this at the time appellee married the appellant." (B 29.) The parties were married in January of 1938. The property where the business is now conducted and described as Lot 2 and the east one foot of Lot 3 of Block 39, as above described, was purchased in 1942. (R 130.) Appellant had no property at the time of his marriage except the painting business and the undetermined amount that he paid down on the Sunshine Market property. (R 129.)

As to the allowance of \$10,000.00 made by the Court to defendant as his investment in the business owned by appellant at the time of the marriage, appellant

testified that the business at the time of the marriage was worth somewhere between \$10,000.00 and \$15,000.00. (R 128.) As previously mentioned defendant on cross-examination was asked to break down that valuation. The only figures mentioned by appellant as a breakdown of the value of such business totalled no more than \$4,000.00 (R 148) and adding to that the paint stock of \$2,500.00 claimed by appellant in his direct examination, the total of the figures given by appellant was \$6,500.00. This figure incidentally was a figure as to assets without any deductions at all for liabilities and certainly could not have been considered as representing net worth. The plaintiff had testified that she considered defendant's net worth at the time of the marriage did not exceed \$5,000.00. Taking the evidence in the light most favorable to the appellee, and giving effect to the presumptions favoring the findings of the trial Court (Barron and Holtzoff, Federal Practice and Procedure, Sec. 1131, page 831), it cannot be said that the findings of the trial Court were clearly erroneous. See, also, Barron and Holtzoff, Federal Practice and Procedure, section 1133, under the heading "Clearly Erroneous" where the following appears at note 19:

"Findings of fact are not clearly erroneous unless unsupported by substantial evidence or clearly against the weight of the evidence or induced by an erroneous view of the law."

And at note 20:

"The mere fact that on the same evidence the Appellate Court might have reached a different result does not justify it in setting the findings

aside. The Appellate Court does not consider and weigh the evidence de novo.”

And at note 21:

“In considering whether trial court’s findings are clearly erroneous, appellees must be given the benefit of all favorable inferences which may reasonably be drawn from the evidence.”

Lassiter v. Guy F. Atkinson Co., C.A. 9, 1949, 176 Fed. (2d) 984. See, also, *Pacific Portland Cement Co. v. Food Machinery and Chemical Corporation*, C.A. 9, 1950, 178 Fed. (2d) 541 where the Court held that the conclusion reached by the trial Court is not clearly erroneous even if there is evidence in the record from which different conclusions might have been reached.

Appellee maintains that the finding of the Court allowing appellant the sum of \$10,000.00 as a credit for the value of his business at the time of the marriage of the parties is amply sustained by the evidence and that such finding is not clearly erroneous.

Appellee will concede that the discretion of the Court in dividing the property between the parties to a divorce action is not absolute and that arbitrary and capricious actions of the Court may be reviewed. Appellant claims that a fair and equitable division of the property between appellant and appellee would not include any division of the property which appellant says was his separate property at the time of the marriage. Certainly that doesn’t follow as a matter of law in view of the Alaskan statute above cited. However, as herein shown appellant had no property at the time of the marriage except a paint business

and an undisclosed amount paid toward the purchase of a piece of property purchased at a total price of \$6,000.00 and paid out largely, if not almost entirely, after the marriage of the parties. The *Colvin* case cited by appellant on page 32 of his brief differs so radically on its facts from the case with which we are here concerned that it has no validity as authority at all. In the first place, this divorce was not granted to the husband because of the fault of the wife. The divorce was granted to the wife because of the fault of the husband. In the second place, from the record it cannot be disputed that the parties worked jointly from the inception of the marriage until well after the final separation of the parties in acquiring the property which was acquired.

As previously set forth, appellee believes the Court endeavored to divide the property of the parties equally between the parties and appellee believes that such division cannot be said to be an abuse of discretion and erroneous.

In section F of his argument appellant objects to the fact that the Court allowed the plaintiff \$700.00 a month in the nature of a salary for the year 1953. Appellant claims that there is no evidence to show that appellee worked in the store in 1953. As a matter of fact, the evidence stands undisputed that appellee worked in the store for the first three months of 1953 and then left the store by mutual agreement of the parties as the parties were not able to get along at the store. (R 91.) However, appellee believes that it is immaterial as to whether the Court calls the

money allowed a salary or whether it calls it support which the Court admittedly could have ordered the appellant to pay to the appellee. The record stands undisputed that appellee on the scale of living to which she was accustomed during the marriage of the parties required at least \$1,000.00 a month as living expenses, or required the sum of \$750.00 a month over and above the wages she was earning at the time of the trial. It also stands undisputed that appellee was drawing the sum of \$1,000.00 per month from the business up until the filing of the divorce action and that thereafter the defendant paid to her the sum of \$1,000.00 the first month and cut it to \$600.00 the second month and later cut it to \$500.00 and later started taking the expenses of operating the house, including fuel and utilities, out of the payments made. The sum of \$1,000.00 above mentioned had been in addition to the utilities and taxes on the family home which were paid out of the business. (R 92.)

As will appear from the record, although the tabulation is not in the record, appellee actually drew something over \$16,0000.00 in the year 1953, including taxes, utilities, cash payments and a charge back to the plaintiff of the value of an automobile traded in by her. Certainly there couldn't be any objection to the Court allowing plaintiff the sum of \$700.00 per month toward her support even if, as contended by appellant, the Court could not allow salary, which contention is specifically denied by appellee.

Also, as will appear from the record, the sum of \$700.00 per month was debited against the drawings

charged to the plaintiff, and the defendant was credited with \$700.00 per month against which were charged the drawings charged against him. The record of these drawings was kept by the defendant and it appears without dispute that all of defendant's living expenses, except his eating expenses, were charged against the business. Defendant lived in an apartment owned by the business. He took his trips at business expense. His fuel and his utilities were paid by the business. He used an automobile owned by the business and charged the expense of operating and repairing such automobile to the business. None of these items were charged against defendant in the drawing accounts maintained by the defendant. (R 155 to 156.) All in all it would appear that appellant has no reasonable right to complain of the allowance made to the plaintiff of \$700.00 per month for the year 1953. Certainly there is no showing at all that the finding of the trial Court is clearly erroneous.

Section G of appellant's argument is to the effect that the Court erred in signing the Findings of Fact and Conclusions of Law and Decree prior to the report of the appraisers. Appellee will agree that the appraisers did not report prior to the signing of the Findings of Fact and Conclusions of Law. In fact, the Findings of Fact and Conclusions of Law and Decree provided for the appointment of the appraisers. The report was made under the terms of the Findings of Fact and Conclusions of Law and Decree. Neither the Findings of Fact nor the Conclusions of Law nor the Decree either directed or authorized the three appraisers to appraise the value

of the defendant's business at the time of the marriage. The Court had already determined that matter. (R 27, 33.) Likewise, the Master's report was made long before the signing of the Findings of Fact and Conclusions of Law and the Decree.

The Court did not refer to the Master any question as to the value of defendant's property at the time of the marriage. Counsel for plaintiff invited defendant to make his books kept at the time of the marriage available to the Master but defendant did not see fit to do so. The only reasonable inference which can be drawn is that defendant was satisfied with the testimony given on the point at the trial or possibly that defendant knew the books, if produced, would be less favorable to him than the testimony.

It doesn't appear that appellant in section G of his argument has stated anything at all which would tend to show that the action of the Court in signing the Findings of Fact and Conclusions of Law and Decree was erroneous in any respect whatsoever.

In paragraph H of his argument, appellant objects to the fact that the Court allowed to the plaintiff the sum of \$500.00 per month for temporary support from January 1, 1954, until October 31, 1954. Apparently, appellant concedes that the Court had the power to award temporary support to the plaintiff, but claims that in view of the amount of property awarded to the plaintiff that plaintiff should not have received any temporary support. The record will disclose that plaintiff asked for temporary support prior to the trial and that the Court considered the matter

at the end of the trial on December 22, 1953. Appellant has shown nothing at all as to how it is claimed that the Court erred in making the finding that plaintiff was entitled to receive from defendant \$500.00 per month for the first ten months of 1954. In any event no showing has been made of any error in that respect.

With reference to the citation from 26 *Am. Jur.* found on page 35 of appellant's brief, it should suffice to say that, although the citation states a perfectly valid proposition of law where the facts justify it, it has no application in this case where the evidence is undisputed that the parties separated by reason of the fault of the husband.

Appellee has already answered at some length the arguments contained in sections I and J of appellant's brief with reference to the claimed errors in Findings of Fact numbered seven and eight and Conclusion of Law numbered five. They do not require any attention at this point, except to state that it doesn't follow as a matter of course that the property belonged to appellant because it stood in his name. Appellant hasn't shown a single fact to support his contention that the property division ordered by the Court was inequitable.

VI.

CONCLUSION.

In conclusion, appellant here has made many arguments to the effect that the Findings of Fact and Con-

clusions of Law and Decree rendered by the trial Court were inequitable and unfair and not based on the evidence, but appellant has failed to show a single instance in which the Findings of Fact and Conclusions of Law and Decree were not strictly in accordance with law and were not based upon the evidence or were inequitable in any respect. The parties had been unable to reach an amicable property settlement and it became the duty of the Court to settle the property rights of the parties. The Court settled those property rights by coming as near as was practically possible to dividing the property equally between the parties. As pointed out in the argument if either party was favored in the division made it was the appellant. While it seems to be the contention of the appellant that any division of the property which gave the plaintiff anything at all was inequitable, it seems to appellee that on all of the evidence and under the laws of the Territory of Alaska, the division made by the Court was entirely fair to both parties and for that reason appellee respectfully submits that the action of the lower court should be affirmed.

Dated, Anchorage, Alaska,
July 31, 1956.

Respectfully submitted,
DAVIS, RENFREW & HUGHES,
By EDWARD V. DAVIS,
Attorneys for Appellee.

No. 14,877

IN THE

United States Court of Appeals
For the Ninth Circuit

HAROLD D. PADDOCK,

VS.

FLORENCE PADDOCK,

Appellant,

Appellee.

On Appeal from the District Court for the
District of Alaska, Third Division.

REPLY BRIEF OF APPELLANT.

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FILED

AUG 27 1956

PAUL P. O'BRIEN, CLERK

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REPLY BRIEF OF APPELLANT.

I.

Because of the new matters raised and the distorted interpretations of the facts in the record by Appellee, Appellant feels constrained to file this reply to the Brief of the Appellee.

II.

**STATEMENT AS TO PLEADINGS AND
PROCEEDINGS AND FACTS.**

On page six of Appellee's Brief, reference is made to Exhibit I and Exhibit II, in referring to appraisals

of the business of the Defendant. No citation was given for the Exhibits, which do not appear to be in the record, and, therefore, it is not possible to determine whether or not an appraisal of Seventy Thousand (\$70,000.00) was made by Gene Silberer, as alleged in Appellee's Brief, nor is it possible to determine whether a Fifty Nine Thousand Three Hundred Fifty Dollars (\$59,350.00) appraisal was made by the City, also as alleged. In fact, the only reference to the record on this matter, namely page 43 on the record, indicates that the fair value of the property was Fifty Five Thousand, in the accounting that was accepted by the Court. Mr. George R. Jones, in his statement to the Court stated at (TR 43)

“We were, however, unable to mutually agree upon the value of the Real Estate described and accordingly called in Mr. Renfro and a fair value of \$55,000.00 was accepted by all concerned.”

The appraisal of Fifty Five Thousand (\$55,000.00) appears to be fair and was agreed to by the third party called in, namely Mr. Renfro, a Vice-President of the First National Bank of Anchorage. In any event the figure of Fifty Five Thousand (\$55,000.00) seems to be accepted by all parties as the value of the property, but on pages twenty-one and twenty-two of Appellee's Brief, there is an attempt to infer that the Appellant got the advantage of Fifteen Thousand Dollars (\$15,000.00) because of the alleged difference between the Fifty Five Thousand (\$55,000.00) and some appraisal in the amount of Seventy Thousand Dollars (\$70,000.00). The alleged appraisal of Sev-

enty Thousand Dollars (\$70,000.00) does not appear in the record and it does not appear anywhere in the record that Appellant obtained any Fifteen Thousand Dollars (\$15,000.00) advantage in the computations by the Court.

III.

QUESTIONS FOR DETERMINATION.

Under this section of Appellee's Brief, on page nine, it is stated that the Appellant claims that the business and the property all belong to him as an individual, and that he is entitled upon dissolution of the marriage to all of the property acquired both before and after the marriage. This statement is categorically untrue. Nowhere in the record does the Appellant even suggest that he is entitled to all of the property, but has insisted at all times upon an equitable distribution of the property, which would allow the Appellant the property that he had at the time that he married Appellee.

The Appellee, on page nine and ten of Appellee's Brief, infers that only four questions need be determined. However, there are ten sections to Appellant's Brief (A to J) which are still before this Court for determination.

IV.

SUMMARY OF ARGUMENT.

At page eleven of Appellee's Brief, it is stated that the claim of Appellant that the Court decided this case

on the theory of partnership is not sustained by the evidence. This statement is incredible in view of the statements of the Court concerning the parties of this action wherein the Court felt that they were partners. See Appellant's Brief, pages 14-15 and in particular the Court's discussion on page 104 of the record.

Further on in this same section, the Appellee, in referring to the Appellant, states:

"He charged everything conceivable against the drawing account of Appellee but charged only a nominal amount against his own drawing account."

The inference to be drawn from this is false for the reason that there is nothing in the record that shows that the appellant made any such preferential charges. There is no showing that all proper charges were not properly charged to the two different accounts and taken into consideration by the appraisers and accountants.

At page 12 of the Brief, the Appellee further infers that Appellant was actually getting his living out of the business and that it was costing him nothing. Such a statement is unsupported by the record. In fact, the record will show that Appellant was living on approximately One Hundred Dollars (\$100.00) a month after he had been forced to leave his own home, during the same period of time in which Appellant actually drew something over Sixteen Thousand Dollars (\$16,000.00). See Appellee's Brief page 37. The figures involved herein can indicate only one thing, namely that Appellee was extravagant. Counsel for

Appellee indicated that the business of the Appellants was making roughly Twenty Five or Twenty Six Thousand Dollars per year, which apparently would be the gross earnings of the business. However, the Appellee saw fit to spend approximately Sixteen Thousand Dollars (\$16,000.00) in one year.

Further on in this same section the Appellee refers to Five Hundred Dollars (\$500.00) per month of temporary support money. This amount, however, would only amount to the rate of Six Thousand Dollars (\$6,000.00) per year which is considerably less than Sixteen Thousand (\$16,000.00) drawn by Appellee in 1953. This temporary support should also be considered in viewing the Appellee's objection to the Appellant having control of the business. It hardly seems reasonable to expect the Appellant to pay Five Hundred Dollars (\$500.00) temporary support money unless he did have control of the business, although the Appellee has raised this issue many times.

V.

ARGUMENT.

Again, at page 15 of Appellee's Brief, it is stated that Appellee made no claim that the business was in fact a technical partnership. This is another incredible statement in view of the statement by Appellee's attorney (page 67 of the record), that the parties had conducted that business as a partnership for many years. It does not appear anywhere in the record that the

Appellee changed this statement or modified it in any way, so the foregoing statement of Appellee's Brief is clearly not true.

On page 16, the Appellee again states that Appellant claimed all the property and that his wife had no interest in it. This statement on its face is false, since the evidence was uncontroverted that the Appellee had one house and lot in her name, which had been acquired during the marriage of the parties (TR 85). The inference to be gathered from this statement of Appellee's Brief is also in error, since it is inferred that Appellant wants all the property without allowing the wife anything. The Appellant has never, at any time, ever put forth such a claim, nor does it appear in the record. The inference is preposterous, since all that the Appellant wishes is an equitable and just division of the property acquired after the marriage.

At page 17 of the Appellee's Brief it is stated that there was never any finding by the Court, oral or otherwise, that there was a partnership. There may not have been a written finding by the Court, but the oral statement of the Court at the bottom of page 103 of the record clearly makes the foregoing statement false. This point was further discussed at page 22 of the Appellee's Brief, where the Appellee stated that the Court indicated that it did not consider such question as being of any importance in reference to the question of partnership. In view of the Court's statement at page 103 and 104, the Appellee's statement is contrary to the record.

Another distortion of the facts and of the record occurs at page 23 of Appellee's Brief wherein it is stated:

"In a cross-examination when Defendant was asked to break down the claimed net worth of his business at the time of the marriage, he came up with the total figure of approximately \$4,000.00."

The citation is to page 148 of the record, but the statement is completely unsupported by the reference. Page 148 of the record shows that the Appellant had an automobile worth approximately Two Thousand Dollars (\$2,000.00) and paint brushes worth between One and Two Thousand Dollars. No other testimony was brought out concerning the value of the real property, cash on hand, accounts receivable, and other assets that may have been owned by Appellant or in Appellant's business at that time.

From that same page 23 of Appellee's Brief, the Appellee attempts to cast the Appellant in a poor light by claiming that he refused to produce books. The inference is again misleading for the reason that the only reference to the books was the one indirect request for the books made at page 149 of the record as follows:

"Q. All right. I wish that you would get out, please, the books that you kept during the years 1937, '38 through 1940 so we (97) can give them to Mr. Godchaux . . ."

This indirect request was never pursued further. No purpose for such a request is apparent since the record shows that Mr. Godchaux kept the books for

the Appellant (TR 150) and Mr. Godehaux was also appointed the master in this case (TR 72). If the information was desired, it obviously could have been received from the master. The fact that it was available undoubtedly accounts for the failure of the Appellee to pursue this particular question further.

On page 24 of the Appellee's Brief, it is stated that Mr. Paddock owned no real property at the time of the marriage. This is again misleading for the reason that the Appellant was buying the property where the store was located at the time of the marriage, although it may not have been completely paid off (TR 126). Appellant may not have had the legal title to the property at this time, but he at least owned an equitable interest by virtue of a real estate contract. The Appellee seems to make quite a point out of the fact that the title to the property was not acquired until after the marriage, but such an argument is purely technical and not based upon justice and practicalities whatsoever.

The Appellee has strenuously attempted to show that the Appellant was worth little or nothing at the time that she married him, and such twisting and distortion of the facts has been attempted in order to attempt to make such a showing. However, the true facts remain, that practically all of the value of the business of the Appellant was due to the efforts of the Appellant and his investments made prior to the marriage. The evidence shows that the Appellant joined in a partnership in 1932 with Edward T. McNally in a paint contracting business (TR 125). This

partnership later on opened up a Dutch Boy Agency for Dutch Boy Paints and also installed a stock of paints and wallpaper. The Appellant eventually bought out Mr. McNally's half (TR 148) and then some time after the marriage, the Appellant also bought out his former partner's buildings where the Paddock Paint and Furniture Store is now in business. The results are all the natural results of a partnership formed by the Appellant in 1932, which are now claimed by the Appellee to be due to her efforts.

On page 25 of the Appellee's Brief, Appellee states:

“There isn't any evidence at all that the Court in making the division didn't take into consideration any increase in the value of any property owned by Appellant at the time of marriage.”

This statement is false on the face of the record.

In finding of fact No. V, the Court found:

“That prior to the marriage of the parties, the Defendant, Harold D. Paddock was operating a certain business and had an investment at that time in such business in the amount of Ten Thousand Dollars (\$10,000.00).” (TR 25.)

Then on page 33 of the record, in the decree, the Court allowed the Defendant, Appellant herein, “the sum of Ten Thousand Dollars (\$10,000.00) invested by the Defendant in the business known as Paddock Paint Store prior to the marriage of the parties.” The record therefore shows that the Court found that the Appellant had invested Ten Thousand Dollars (\$10,000.00) in his business, but in the decree the Court allowed him exactly Ten Thousand Dollars

(\$10,000.00) for said investment, even though that was the sum invested prior to the time of the marriage of the parties in 1938.

The Appellee has quoted part of section 1128 of Barron and Holtzoff, Federal Practice and Procedure, covering only the last paragraph. However, section 1128 of this authority starts out:

“Under Rule 52 as amended, ‘If an opinion or memorandum of decision is filed, it will be sufficient if the Findings of Fact and Conclusions of Law appear therein’.”

Thus we have a filed memorandum opinion in this case, wherein the Court did make its Findings and Conclusions of Law. The formal Findings of Fact and Conclusions of Law were filed approximately two and half months later, namely on December 22, 1954, while the opinion had been filed on October 8, 1954. The Appellee has stated that the opinion does not purport to be Findings of Fact and Conclusions of Law, but a check of the memorandum opinion will show that the Judge had started seven paragraphs off with “I find” or “I further find” (TR 18-22).

It is also stated by the Appellee on page 28 of Appellee’s Brief that it is debatable as to whether there was any inconsistency at all between the opinion of the Court and Findings of Fact. Such a statement seems irreconcilable with the report of the auditor (TR 52-54).

At page 29 of Appellee’s Brief, the Appellee submits the proposition that the Appellant has a burden

of presenting a proper record to the Court of Appeals, showing that the evidence compelled findings in his favor. However, nothing is shown as to why the Appellant's record would be inadequate, or improper, and the Appellee supports this proposition with *Jernigan v. Southern Pacific Company*, C.A. 9, 1955, 222 Fed. (2d) 245; *McClyman v. Hamilton*, C.A. 9, 1950, 180 Fed. (2d) 965. Neither of these cases are in point, with the *Jernigan* case merely standing for the proposition that the trial court can correct clerical errors, while the *McClyman* case concerns the bankruptcy of a partnership.

At page 35 of Appellee's Brief, the Appellee has supported the proposition that the Appellee must be given the benefit of all favorable inferences which may reasonably be drawn from the evidence by *Lassiter v. Guy F. Atkinson Co.*, C.A. 9, 1949, 176 Fed. (2d) 984. However, this case also stands for the following proposition which is quoted from page 993 of the opinion.

"If, on the entire evidence, we are 'left with the definite and firm conviction that a mistake has been committed', it is our duty to reverse the findings . . ."

The quotation also refers to *United States v. U. S. Gypsum Co.*, 333 U.S. 364, 395, in support of the foregoing proposition.

The Appellee has also referred to *Pacific Portland Cement Co. v. Food Machinery and Chemical Corporation*, C.A. 9, 1950, 178 Fed. (2d) 541, but this case, too, also stands for propositions other than that

set forth by the Appellee, as indicated in the opinion at page 548 as follows:

“As a corollary to this rule, we may make our own inferences from undisputed facts or purely documentary evidence. For, to use the colorful language of the Court of Appeals for the Third Circuit, the rule does not operate ‘to entrench with like finality the inferences of conclusions drawn by the trial court from its fact findings’ ”.

At page 36 of Appellee’s Brief it is stated:

“In the first place, this divorce was not granted to the husband because of the fault of the wife. The divorce was granted to the wife because of the fault of the husband.”

The record does not seem to show that the Defendant was clearly at fault in the matter of the divorce and the proof that was put on by the Appellee merely went to show incompatibility. The attorney for the Appellee stated at page 66 of the transcript “but I intend in this matter to put on proof of a general nature which I believe will establish incompatibility between the parties.” It is true that the Appellee did put on this showing of incompatibility (TR 77-79) but it does not clearly appear that the Appellant was the party at fault.

The same point is referred to at page 40 of Appellee’s Brief, wherein Appellee states that the 26 *Am. Jur.* 939 citation is not applicable because the Appellee states that the “evidence is undisputed that the parties separated by reason of the fault of the husband.” This statement is baldly false for the reason that the state-

ment is not only disputed but for the further reason that there is no evidence to support such a statement. The rule as quoted in 26 *Am. Jur.* page 939 and in Appellant's Brief at page 35-36, is applicable and had the Appellant been able to open up the case he would have been able to apply this rule to this particular case.

VI.

In conclusion, we can only repeat that the Appellee should be entitled, at most, to a reasonable part of the value of the property accumulated by Appellant and Appellee after marriage, there being no children born of said marriage. To reach such a determination, Appellant should be entitled to the present value of his pre-marriage investment and its accumulations and enhancements in value with the remainder at the very most being divided equally between Appellant and Appellee, and even this is much more than Appellee is entitled to even if the Judgment granting her a divorce should be upheld.

Dated, Anchorage, Alaska,

August 16, 1956.

Respectfully submitted,

BELL, SANDERS & TALLMAN,
Attorneys for Appellant.

No. 14,879

United States Court of Appeals
For the Ninth Circuit

BANK OF AMERICA NATIONAL TRUST
AND SAVINGS ASSOCIATION, as Exec-
utor of the Last Will and Testament
of Thomas McDonough, deceased,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

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FILED

JUN 17 1964

U.S. COURT OF APPEALS
NINTH CIRCUIT

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United States Court of Appeals For the Ninth Circuit

BANK OF AMERICA NATIONAL TRUST
AND SAVINGS ASSOCIATION, as Exec-
utor of the Last Will and Testament
of Thomas McDonough, deceased,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

JURISDICTIONAL STATEMENT.

This is an appeal from a judgment of the District Court of the United States for the Northern District of California, Southern Division. The opinion of the Court below is reported at 130 Fed. Supp. 923 and is set forth in the record herein (R 71). Appellant is a national banking association organized and existing under and by virtue of the laws of the United States of America. Its principal place of business is in the City and County of San Francisco, State of California, and in the Northern District of California,

Southern Division. It is the duly appointed and qualified executor of the Last Will and Testament of Thomas McDonough, who died in San Francisco, California, on September 13, 1948, leaving a Last Will and Testament wherein plaintiff was named executor thereof (R 3 and 4, paragraphs 2 and 3, admitted in answer, R 19, paragraphs 2 and 3).

The action arises under the Internal Revenue laws of the United States and is for the recovery of estate taxes assessed against and collected from the appellant with respect to the estate of said Thomas McDonough by the appellee through its agents, James G. Smythe and Charles F. Masarik, Jr., the then Collectors of Internal Revenue for the First District of California, neither of whom was in office as Collector of Internal Revenue at the time this action was commenced (R 3, 4 and 5, paragraphs 1, 4, 5, 6, admitted in answer, R 19, paragraphs 1, 4, 5 and 6). After the payment of said taxes the appellant duly filed written claim for refund thereof as provided by law and said claim was rejected by the appellee through its agent, the Commissioner of Internal Revenue, on March 3, 1953 (R 5, paragraph 7, admitted in answer, R 20, paragraph 7).

This action was commenced in the District Court on May 8, 1953 (R 19). It was brought pursuant to the provisions of Section 1346 of the Judicial Code, USC Title 28, and arises under the Internal Revenue Code of February 10, 1939, C. 2, 53 Stat. 1, as amended, Sections 800 to 937 (Sections 800 to 937, Chapter 3, Estate Tax of Subtitle A, Title 26 USCA)

(R 3, paragraph 1, admitted by answer, R 19, paragraph 1).

The matter came on for trial before the District Court and the judgment of that Court was entered June 20, 1955 (R 80). On August 15, 1955, under Sections 1291 and 1294 of the Judicial Code, USC Title 28, appeal was taken to this Court to review the judgment of the Court below (R 80). This appeal and transcript of record were filed and docketed in this Court on September 21, 1955 (R 106).

STATEMENT OF THE CASE.

(a) Nature of the Case.

This case involves the Federal estate tax liability of the estate of Thomas McDonough, who died September 13, 1948. At the time of his death he owned property which he had acquired as surviving joint tenant from Peter P. McDonough, who died July 8, 1947, and which property had been included as part of the gross estate in the estate tax return filed for the estate of Peter P. McDonough. At times Peter P. McDonough will be referred to herein as the first decedent and Thomas McDonough as the present decedent.

The Federal estate tax is a tax at certain rates upon the net estate of the decedent. The net estate is the gross estate less certain deductions and exemptions. The gross estate includes all of the property of the decedent. (Section 811 of the Internal Revenue Code of 1939.) The deductions (Section 812 of the

Internal Revenue Code) include a deduction for property previously taxed which is described as an amount equal to the value of any property (1) forming a part of the gross estate situated in the United States of any person who died within five years prior to the death of the decedent where such property can be identified as having been received by the decedent from such prior decedent by gift, bequest, devise or inheritance. It is further provided that this deduction shall be allowed only where an estate tax was finally determined and paid by or on behalf of the estate of such prior decedent, and only in the amount finally determined as the value of such property in determining the value of the gross estate of such prior decedent, and only to the extent that the value of such property is included in the decedent's gross estate. (Section 812(c) of the Internal Revenue Code of 1939.)

In this case it is stipulated that the present decedent owned at the time of his death property acquired from the first decedent of a value of \$585,719.23 and that such property when included in the estate of the first decedent was included therein at a value of \$577,971.92 (R 23 and 24, paragraph 4(b) and paragraph 5).

Most of the net estate of the first decedent was made up of the property acquired by the present decedent. The estate tax of the first decedent had not been settled and paid until after the present decedent had died, and the amount of that tax paid by the present decedent's estate was \$141,592.71, all attrib-

utable to said jointly owned property (R 23 and 24, paragraphs 4(e) and 4(f)).

The statutory provision authorizing the deduction for property previously taxed (Section 812(c)) first provides for the amount at which such deduction should be identified and valued. It then provides for the application of certain mathematical computations to reduce the first value by certain adjustments. No issue is raised in this appeal as to the calculation of these adjustments, but they will have to be recalculated should this Court reverse or modify the decision of the Court below. The sole issue relates to the initial evaluation for the deduction before adjustment through the mathematical computations, and as to this issue the appellant contends that the property previously taxed should be identified and evaluated at the amount of \$577,971.92 at which it was included in the gross estate of the first decedent. The Government contends it should be valued at the gross value less the Federal estate taxes and other charges against the first decedent's estate.

The District Court decided in favor of the Government.

(b) Facts.

The facts are not in dispute. They are set forth in the complaint (R 3-12) as admitted by the Answer (R 19-21), and in the Pre-Trial Order (R 21-24), as follows:

Peter P. McDonough died in San Francisco, California, on July 8, 1947. At the time of his death he

and his brother, Thomas McDonough, owned certain property as joint tenants. One half of the value of this property, or \$577,971.92 (R 23) was included in Peter's gross estate for purposes of determining his Federal estate tax liability, which amounted to \$149,289.84. The part of this Federal estate tax which was attributable to the joint tenancy property was \$141,592.71 (R 24).¹

The said joint tenancy property passed to Thomas before the tax owed by Peter's estate was paid, and the tax remained unpaid at the death of Thomas on September 13, 1948. Subsequently, it was paid, \$141,686.05 by Thomas' executors on October 8, 1948.

The said joint tenancy property was owned by Thomas at the time of his death, and the gross value of said property included and identified in the Estate of Thomas as having been received by him from Peter, without taking account of any proportionate amount of the Federal estate tax in Peter's estate, was the sum of \$585,719.23 (R 24).

On the Federal estate tax return filed for the Estate of Thomas, the deduction for property previously taxed was computed by identifying the property acquired from Peter at its gross value less Peter's Federal estate tax of \$141,686.05 attributable thereto (R 78). Appellant contends in this action that the return was in error in reducing the gross value by the tax for the purpose of determining the deduction in Thomas' estate for property previously taxed.

¹Originally computed at \$141,686.05 but finally determined in later Government audit to be \$141,592.71.

In the Government's audit of the estate tax return for Thomas' estate, the identifying value of the property previously taxed was computed as follows (R 65):

Total gross estate of Peter.....	\$638,673.66	
Less deductions claimed and allowed.....	27,093.53	
		<hr/>
Net	\$611,580.13	
Less:		
Federal estate taxes.....	\$149,289.84	
Inheritance taxes	49,263.81	
Net specific legacies to others		
than Thomas	39,116.47	207,670.12
	<hr/>	<hr/>
Theoretical balance of property		
previously taxed in present		
(Thomas) estate		\$373,910.01
Adjustment		15.23
		<hr/>
Identified property previously taxed.....	\$373,894.78	
	<hr/>	<hr/>

This amount was then used as the basis for the mathematical computations for proportionate reductions (R 63-64). Appellant contends that there is no statutory basis for the method used by the Government in identifying the "theoretical" value of property previously taxed.

The District Court sustained the Government both in the finding that \$373,894.78 represented the net value of the interest of Thomas in the property previously taxed in Peter's estate (R 76-77), and in the legal conclusion that for the purpose of the property previously taxed deduction in Thomas' estate, the property is to be identified only at its net value after deducting from its gross value the amount of the Fed-

eral estate taxes attributable thereto and other debts and charges in Peter's estate (R 78). In its Statement of Points on Appeal, appellant sets forth these findings and conclusions as alleged errors, both as findings of fact not supported by the evidence, and conclusions of law not in accord with the controlling statutory provisions (R 107-110).

None of the items making up the \$207,670.12 of reductions shown in the Government's computation above tabulated are deductions for estate tax purposes and none were deducted in the estate of Peter McDonough in determining the estate tax liability of that estate, but credit was allowed for inheritance taxes.

(c) Issues Involved.

(1) Is the Government's determination of the "identified property previously taxed" as \$373,894.78 (R 65) correct in the light of the agreed fact that property included in the first decedent's gross estate at a value of \$577,971.92 was identified as owned by the present decedent at the time of his death and had a value at that time of \$585,719.23.

(2) In determining the identified value of such previously taxed property, is it proper to reduce the value of such property by Federal estate taxes against the first decedent's estate unpaid at the time of death of the present decedent?

(3) Where property included in the gross estate of a decedent is identified as having been included in the gross estate of a prior decedent, does the provision of Section 812(c), Internal Revenue Code of 1939,

to the effect that the property previously taxed shall be determined "in the amount finally determined as the value of such property in determining the gross estate of such prior decedent, and only to the extent that the value of such property is included in the decedent's gross estate * * *" mean the *gross estate* valuation of such property or the gross estate valuation less the Federal estate tax liability of the prior decedent's estate unpaid at time of the present decedent's death?

STATUTES INVOLVED.

Chapter 3 of the Internal Revenue Code of 1939. The pertinent text of Sections 810, 811, 812 and 827 particularly applicable is set forth in Appendix A attached.

SPECIFICATION OF ERRORS RELIED UPON.

The specification of errors relied upon is set forth in Appellant's Statement of the Points on which it intends to rely (R 107-110), as follows:

- (1) The judgment and decision is against law.
- (2) The Findings of Fact do not support either the Conclusions of Law or the Judgment.
- (3) That portion of Finding 4 reading as follows is not supported by the evidence, and in fact is a conclusion of law, and said conclusion of law is erroneous, to wit:

“The net value of said jointly-owned property to which Thomas McDonough succeeded by virtue of the death of Peter P. McDonough was \$373,910.01, computed by deducting from the gross estate of Peter P. McDonough the specific legacies, the federal estate taxes, the state inheritance taxes and the deductions in the amounts set forth above.”

(4) That portion of Finding 5 reading as follows is not supported by the evidence, and in fact is a conclusion of law, and said conclusion of law is erroneous, to wit:

“This left a net adjusted value of the interest of Thomas McDonough in the jointly-owned property included in the prior estate and included in Thomas McDonough’s estate to which interest Thomas McDonough succeeded on Peter P. McDonough’s death of \$373,894.78.”

(5) Failure to find that the amount of property previously taxed within five years received by Thomas McDonough from Peter P. McDonough, which was entitled to be deducted from the gross estate for Federal estate tax purposes in the Estate of Thomas McDonough, was the sum of \$577,971.92.

(6) Failure to find that in computing the Federal estate tax due from the Estate of Thomas McDonough, said estate was entitled either to have the full amount of said jointly-owned property included in the gross estate of said Thomas McDonough with a credit for the amount of the Federal estate tax of \$141,592.71 due and unpaid in the Estate of Peter P. McDonough, with a deduction of said previously taxed property

amounting to \$577,971.92; or, in the alternative, to have the gross estate of Thomas McDonough reduced by the said tax of \$141,592.71, and still be entitled to a deduction of \$577,971.92 for the property previously taxed in the Estate of Peter P. McDonough.

(7) Failure to find that notwithstanding the form in which the gross estate for Federal estate tax purposes was set forth in the estate tax return in the Estate of Thomas McDonough, plaintiff nevertheless was entitled in computing the deduction for property previously taxed in the Estate of Peter P. McDonough to have such computation made in accordance with the Federal estate tax provisions, i.e., the applicable law, at the full amount of \$577,971.92.

(8) That said judgment is against law in that it did not compute the jointly-owned property previously taxed in the Estate of Peter P. McDonough at the full value of \$577,971.92.

(9) That said judgment is against law in that it holds that the Federal estate tax of \$141,592.71 paid by the Estate of Thomas McDonough upon the joint property left by Peter P. McDonough and due in said Estate of Peter P. McDonough, had to be deducted from said jointly-owned property of \$577,971.92 in computing the deduction in the Estate of Thomas McDonough for property previously taxed.

(10) That said judgment is against law in that it reduced the deduction for property previously taxed in the Estate of Peter P. McDonough by the items set forth in Finding 4.

SUMMARY OF ARGUMENT.

Section 812(c) describes exactly how the property previously taxed deduction should be computed. The theoretical computations applied by the Government in determining what it calls "theoretical balance of property previously taxed in present estate" have no support from any provision of Section 812(c).

The property previously acquired from Peter McDonough and owned by Thomas McDonough at time of his death, must be included in Thomas' gross estate at its fair market value. Therefore, under the provision in Section 812(c) that the property previously taxed shall be "in the amount finally determined as the value of such property in determining the gross estate of such prior decedent and only to the extent that the value of such property is included in the decedent's gross estate", the identifiable value of the property previously taxed is the fair market value (gross estate value) of the jointly owned property. The Government and the Court below erred in concluding that the "value" referred to in the above quoted provision of Section 812(c) is the gross estate value reduced by the deduction for the unpaid Federal estate taxes of Peter's estate.

Since the identified property was included in the gross estate of Peter at a value of \$577,971.92, and since its fair market value at which it is includible in the gross estate of Thomas is \$585,719.23, the lesser of these two amounts, or \$577,971.92, is the identifiable value of the property for the purpose of computing the property previously taxed deduction under Section 812(c).

ARGUMENT.

This is a case where a technical statute prescribes exactly what must be done to comply with it. Difficulty and confusion has arisen because of the inclination of some of the Courts who have considered similar matters, to digress from the literal wording of the statutes to accomplish what seemed to them to be the fair result. In doing this the Courts have invaded the field of legislation, and have made it difficult to either reconcile different views, or to determine an exact rule of statutory construction, with respect to their application of this statute (Section 812(c)) regarding the deduction for property previously taxed.

Turning to an analysis of the statute—Section 812(c)—and its applicability to this case, it provides that property previously taxed shall be

(1) “An amount equal to the value of any property (1) forming a part of the gross estate situated in the United States of any person who died within five years prior to the death of the decedent * * * where such property can be identified as having been received by the decedent * * * from such prior decedent by gift, bequest, devise or inheritance * * *.”

It is acknowledged in this case that the present decedent died September 13, 1948, that the first decedent died July 8, 1947, that the present decedent owns property identified as acquired from the prior decedent by inheritance (it being recognized that the word “inheritance” includes transfers under right of survivorship (*Commissioner v. Fletcher Savings &*

Trust Co., Exec. (1932), 59 F. (2d) 508, affirming 20 BTA 1049), and that it formed a part of the gross estate of the prior decedent at a value of \$577,971.92 (R 23-24).

(2) The Section then provides—

“This deduction shall be allowed only where * * * an estate tax imposed under this chapter * * * was finally determined and paid by or on behalf of * * * the estate of such prior decedent * * * and only in the amount finally determined as the value of such property in determining the * * * gross estate of such prior decedent, and only to the extent that the value of such property is included in the decedent’s gross estate * * *.”

It is acknowledged in this case that an estate tax was finally determined against the first decedent’s estate attributable to this property and was paid by the executor of the present decedent’s estate; further, that the value of such property was \$577,971.92 *in determining the gross estate of the prior decedent*, and was \$585,719.23 *in determining the gross estate of the present decedent without taking into account the Federal estate tax against the first decedent’s estate*.

(3) The Section then provides that—

“Where a deduction was allowed of any mortgage or other lien in determining the * * * estate tax of the prior decedent, which was paid in whole or in part prior to the decedent’s death, then the deduction allowable under this subsection shall be reduced by the amount as paid.”

In this case the "lien" is the Federal estate tax on the prior decedent's estate; such lien was *not* allowed as a deduction in determining the estate tax of the prior decedent; such "lien" was not paid prior to the present decedent's death but was paid by his estate; so this provision is inapplicable to this case.

(4) The Section then provides for several mathematical computations for reductions of the property previously taxed evaluation. The computations and reductions made in this case will have to be recalculated should the Court reverse or modify the decision of the lower Court (R 24 para. 6).

It seems indisputable that under the provisions of Section 812(c) above analyzed, when applied to this case, the "value" of the property previously taxed is \$577.971.92, and there is no justification whatever for the Government's action in reducing it by the Federal estate taxes paid on the first decedent's estate, and in concluding in effect that the gross evaluation of property previously taxed should be the present decedent's "equity" in the property rather than the value at which such property was included "in determining the gross estate of the prior decedent".

The District Court, in its opinion, observed that decided cases "express conflicting views as to the correct method of valuing the deduction", (R 73) and then concluded "it would seem that the value of property received from a decedent could never be greater than the value of his property less all of the taxes, legacies, claims and charges outstanding against it * * * the value of such property received by an heir

is only the net value after all the claims against the property have been subtracted" (R 73-74). The Court made no detailed analysis of Section 812(c) in its written opinion in arriving at this conclusion.

As hereinabove pointed out the Section is specific in requiring that "this deduction shall be allowed * * * in the amount finally determined as the value of such property in determining * * * *the gross estate* of such prior decedent, and only to the extent that the value of such property is included in the decedent's *gross estate* * * *" (italics ours). It is admitted that the value of such property in determining the *gross estate* of the prior decedent was \$577,971.92 (R 23). It is admitted that the "*gross value*" of such property identified in the present decedent's estate is \$585,719.23 (R 24) without taking into account the \$141,592.71 proportionate amount of the Federal estate tax against the prior decedent's estate. If the \$585,719.23 is the value at which such property must be included in the present decedent's *gross estate* it is obvious that under the above quoted provision of Section 812(c) the identifiable valuation of such property previously taxed is \$577,971.92 since it is the lesser amount.

The only possible support for the contention that the \$577,971.92 value is not the value of the previously taxed property under Section 812(c) must be that for some reason the tax indebtedness of \$141,592.71 must be applied against the property value of \$585,719.23 in determining how much of that value should be included in the *gross estate* of the present decedent. Reducing the matter to simple words—in the deter-

mination of the present decedent's *gross estate*, is the tax obligation something that must be applied against the fair market value of the present decedent's property before determining how much of that value is includible in the *gross estate*; or, is the tax obligation a deduction which does not affect the gross estate but is to be used merely in the "deduction" category in arriving at the net taxable estate.

It would seem that the very structure of the estate tax statute and the specific provision of Section 812(b) should answer that argument. Section 812(b) lists as *deductions* (1) funeral expenses (2) administration expenses (3) claims against the estate, and, most important to this particular case, (4) unpaid mortgages upon, or any indebtedness in respect to, property where the value of the decedent's interest therein, undiminished by such mortgage or indebtedness, is included in the value of the gross estate. It is also significant that Section 812(c) itself speaks of a situation "where a deduction was allowed of any mortgage or other lien in determining the * * * estate tax * * *", indicating that mortgages, liens or other charges against the property are reportable as deductions and do not change the requirement that the gross value of the property must be reported in the gross estate.

In Treasury Department Regulation 105, Section 81.38, it is provided:

"Deduction is allowed of the full unpaid amount of a mortgage upon, or of an indebtedness in respect of, any property of the gross estate * * * provided the value of the property,

undiminished by the amount of the mortgage or indebtedness, is returned as part of the value of the gross estate. If decedent's estate is liable for the amount of the mortgage or indebtedness, the full value of the property subject to the mortgage or indebtedness *must* be included as part of the value of the gross estate; the amount of the mortgage or indebtedness being in such case allowed as a deduction. But if the decedent's estate is not so liable, only the value of the equity of redemption (or value of the property less the indebtedness) need be returned as part of the value of the gross estate."

Section 827 of the Internal Revenue Code, provides as follows:

"(a) *Upon Gross Estate*.—Unless the tax is sooner paid in full, it shall be a lien for ten years upon the gross estate of the decedent, except that such part of the gross estate as is used for the payment of charges against the estate and expenses of its administration, allowed by any court having jurisdiction thereof, shall be divested of such lien. * * *

"(b) *Liability of Transferee, Etc.*—If the tax herein imposed is not paid when due, then the spouse, transferee, trustee, surviving tenant, * * * who receives, or has on the date of the decedent's death, property included in the gross estate under section 811(b), (c), (d), (e), (f), or (g), to the extent of the value, at the time of the decedent's death, of such property shall be personally liable for such tax. * * *"

Since under Section 827 *supra*, Thomas McDonough, and his estate were *personally* liable for the Federal

estate taxes on Peter McDonough's estate to the extent of the value of the jointly held property included in Peter's estate, upon which property such obligation was a lien, it follows that under the Regulation Sec. 81.38 above quoted, the full value of the property or \$587,719.23 *must* be included in Thomas' gross estate and the indebtedness for the taxes *must* be shown as a deduction. The identifiable value, therefore, of the property previously taxed to be used in computing the property previously taxed deduction in the estate of Thomas would be the \$577,971.92 value used "in determining * * * the gross estate of" Peter since such value is less than the \$585,719.23 value at which such property is includible in the gross estate of Thomas.

The conflicting pertinent Court decisions are not too helpful primarily because they fail to analyze all the provisions of Section 812(c) and the manner in which the mathematical adjustment calculations required in the latter part of the Section rectify any tendency to unfair results from strict application of the first few paragraphs of the Section.

In the case of *Bahr v. Commissioner*, CA-5 (1941), 119 F. (2d) 371, involving much the same question as is involved in this case the Court touched upon the nature of the first decedent's estate tax liability as follows:

"For present purposes Frank's fourth of the debts were an incumbrance on Frank's property and not 'claims against the estate' of Eugene. The two things are clearly distinguished in the tax statute and regulations; Sect. 303(a)(1), as amended by Revenue Act 1932, § 805, 26 U.S.C.A.

Int. Rev. Acts, page 232; Reg. 80, Art. 38. That section, providing for deductions, after naming funeral and administration expenses, mentions: (C) Claims against the estate, and (D) Unpaid mortgages upon or any indebtedness in respect to property, where the value of decedent's interest therein, undiminished by such mortgage or indebtedness, is included in the value of the gross estate. Frank's part of the debts, a lien on his part of the property, is 'such mortgage or indebtedness.' Subsection D permits, so far as it is concerned, either that the net value of the property be put in the gross estate in which case the indebtedness may not be deducted, or else the full value may be included in the gross with a contra deduction. There is, as the Board remarks, no difference thus far which is done.

"But when we come to Sec. 303(a)(2), as amended by Sect. 806(a) of the Revenue Act of 1932, which deals with the deduction of property which has caused estate taxes within five years preceding, it does make a difference, both in the basis of this deduction, and in the subtraction from it of the result of the formula with which subparagraph (a)(2) ends. The purpose of these provisions is to avoid a double estate or gift tax on the same property within five years."

The Court then decided that the identified property should be reported in the second decedent's estate as though the taxes had been paid out of that property before the death of the second decedent, and concluded:

"The Federal estate tax and State inheritance tax assessed against the Estate of Frank, though

paid by petitioners after the death of Eugene, are not claims against the estate of Eugene. They go to reduce the value of property received by Eugene's estate from Frank's, along with his fourth of the partnership debts and administration charges, as the Commissioner ruled. The decision of the Board of Tax Appeals is affirmed''.

Judge Hutcheson dissented on the ground that the statute required that the property be valued at its gross value and should not be reduced by the charges and Federal estate tax liabilities of the earlier estate, saying,

“It will not do then for the Board to say to the petitioners we think the method employed by us is more nearly right and just than the one you invoked. For this is not to apply but to rewrite the section. It must be able to point out that its determination is in accordance with the section as amended and not as it formerly was. It has failed to do this.”

Six years later, in the case of *Thomas v. Earnest*, CA-5 (1947), 161 F. (2d) 845, this same Court adopted Judge Hutcheson's dissent in the *Bahr* case, to the extent of deciding that the gross value of the property should *not* be reduced by the Federal estate tax liability of the first decedent's estate. The *Bahr* case, as modified by the *Thomas* case, supports appellant's position here.

In the case of *Central Hanover Bank and Trust Company v. Commissioner*, CA-2 (1947), 159 F. (2d) 167, a somewhat similar question was involved though somewhat distinguishable because the Federal estate tax on the first decedent's estate was paid by the sec-

ond decedent prior to his death. The Court, after admitting that there were conflicting views on the subject, concluded that under Section 812(c) the "identification" of the property previously taxed meant not the physical identity of the assets but rather the identity of the legatee's net financial interest in it. In a similar case the Court of Claims reached the same conclusion in the case of *Bloedorn v. The United States* (1953), 116 Fed. Supp. 133, this Court too recognizing that there were conflicting views, and Judge Littleton dissenting. (To same effect *McCarthy v. Delaney*, Dist. Ct. Mass. (1948), 76 F. Supp. 471, and *Est. of Roswell Ackley*, 23 TC No. 84.)

No reference was made in these decisions to the provision in Section 812(c) that "where a deduction was allowed of any mortgage or other lien in determining the * * * estate tax of the prior decedent, which was paid in whole or in part prior to the decedent's death, then the deduction allowable under this subsection shall be reduced by the amount so paid." The obvious reference is that if the lien had not been allowed as a deduction in determining the estate tax of the prior decedent, or, if it had not been paid before the present decedent's death, then the property previously taxed should not be reduced by the amount of such lien. Certainly if the purpose of this deduction for property previously taxed is to prevent double taxation on the same property there must be some distinction between the situation where property was taxed in full in the prior decedent's estate and the situation where it was taxed only on a net value after deduction of a mortgage and lien. In the

latter case, since the initial evaluation of property previously taxed is the gross or gross estate valuation, it was necessary that Section 812(c) contain a provision to reduce that evaluation by the previously allowed mortgage or lien deduction. But where the lien did not reduce the valuation which was taxed in the previous estate, the situation is the same as though no lien had existed. The *Thomas v. Earnest* decision specifically modified the *Bahr* decision in recognition of this distinction.

A view contrary to the *Central Hanover* and *Bloedorn* cases was expressed in the case of *Commissioner v. Garland*, CA-1 (1943), 136 F. (2d) 82. In that case the Court explained that "it was contended by the Commissioner before the Board, and again before us, that in determining the present decedent's net estate the deduction allowable under Sec. 303(a) (2) on account of property previously taxed is limited to the value of the present decedent's interest in the estate of the prior decedent at the time of the latter's death, which is to be computed by deducting the debts and obligations of the prior decedent's estate from its gross value". The Court refused to go along with this contention saying that "in effect what the Commissioner asks us to do is to go beyond the permissible limits of statutory interpretation * * *." The Tax Court agreed with this view in the case of *Churchill*, 1944 Tax Court Memo decision Docket 109586 dated March 23, 1944.

The difficulty with the *Bloedorn* and *Central Hanover* line of cases is that the Courts seemed to shy away from the statute to prevent what they thought

might lead to a larger deduction than should be allowed to accomplish the purpose of the statute. They overlooked the fact that the reduction adjustments provided for in the fourth paragraph of Section 812(c) have the effect of correcting what might seem to be an excessive deduction, and adequately prevent any excessive or duplicate deductions. In trying to short-cut the formula prescribed by the statute both the Government and some Courts have reached results which would not have been the answer had the statute been strictly applied according to its terms.

By its very nature a statute such as this cannot produce a perfect result in all situations but it is so composed that it generally produces fair results. An example of what appears to be an unfair result to the taxpayer is a case where certain liens were paid prior to decedent's death, and a strict application of the statute produced what appeared to be a too-low deduction for property previously taxed because of a change in the value of the asset subject to the lien, and in discussing this point the Tax Court said, in the case of *Est. of Lizzie Ransbottom*, 3 TC 1041 (1944):

“In this proceeding, the decedent received the specific shares of the Ransbottom Brothers Investment Co. common stock, the Charminel Hotel Co. common stock, and the First National Bank stock which were taxed to the prior decedent's estate. These shares, however, were subject to a lien of \$29,089.67, and the executors of the estate of the prior decedent took a deduction in this amount on the estate tax return under Schedule L, entitled ‘Mortgages and Liens.’ These liens were paid in full prior to the decedent's

death. Under these circumstances, the unambiguous language of section 812(c) requires that the 'deduction allowable', which the parties agree is in the amount of \$105,173.75, must be reduced by the \$29,089.67, which was allowed to the estate of the prior decedent as a deduction for liens. We are not unmindful of the fact that the value of the collateral was substantially less than the amount of the indebtedness and that if such indebtedness was not secured, petitioners would have been entitled to use the amount of \$105,173.75 in computing the net allowable deductions. However, since the wording of the statute is clear and unambiguous, we are not at liberty to enlarge by judicial construction a provision restricting the amount of a deduction. In this situation, we must apply the statute as it is written."

This decision was approved by the Court of Appeals, 6th Circ. 1945—148 F. (2d) 280.

In this case now before this Court a strict application of the statute will produce a fair result. There is no justification for the use of an arbitrary *theoretical* method of computing a deduction allowable under a statute which contains exact rules and formulae for making such a computation. The statute should be followed as it is written.

It is respectfully submitted that Section 812(c) is a clearly defined pattern which will bring forth a product as to which there can be no question. The statute is clear and unambiguous—there can be no doubt of the literal meaning of the requirement that the identifiable value of property previously taxed is

the value used in determining the *gross estate* of the prior decedent and the *gross estate* of the present decedent. Any *theorizing* which ends up in reducing this gross estate value of such property by taxes or indebtedness against the prior estate is a rewriting of the statute which is beyond the province of the Court.

CONCLUSION.

It is respectfully submitted that the District Court erred in concluding that in computing the identified value for property previously taxed, the gross estate valuation of the property previously taxed must be reduced by Federal estate tax and other charges against the first decedent's estate before applying the mathematical computation for adjustment reductions, and the decision of the District Court should be reversed.

Dated, San Francisco, California,
January 11, 1956.

Respectfully submitted,

J. W. RADIL,

F. J. KILMARTIN,

KNIGHT, BOLAND AND RIORDAN,

Attorneys for Appellant.

GEORGE H. KOSTER,
Of Counsel.

(Appendix A Follows.)

Appendix ‘A’



Appendix A

STATUTES INVOLVED—INTERNAL REVENUE CODE OF 1939.

Sec. 810—RATE OF TAX. A tax equal to the sum of the following percentages of the value of the net estate (determined as provided in section 812) shall be imposed upon the transfer of the net estate of every decedent, citizen or resident of the United States, dying after the date of the enactment of this title.

Sec. 811—GROSS ESTATE. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

(a) *Decedent's Interest*.—To the extent of the interest therein of the decedent at the time of his death;

(e) *Joint Interests*.—To the extent of the interest therein held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, or deposited, with any person carrying on the banking business, in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth: Provided,

That where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than an adequate and full consideration in money or money's worth, there shall be excepted, only such part of the value of such property as is proportionate to the consideration furnished by such other person; *Provided further*, That where any property has been acquired by gift, bequest, devise, or inheritance, as a tenancy by the entirety by the decedent and spouse, then to the extent of one-half of the value thereof, or, where so acquired by the decedent and any other person as joint tenants and their interests are not otherwise specified or fixed by law, then to the extent of the value of a fractional part to be determined by dividing the value of the property by the number of joint tenants.

Sec. 812. NET ESTATE. For the purpose of the tax the value of the net estate shall be determined, in the case of a citizen or resident of the United States by deducting from the value of the gross estate—

(a) *Exemption*.—An exemption of \$100,000;

(b) *Expenses, Losses, Indebtedness, and Taxes*.—
Such amounts—

- (1) for funeral expenses
- (2) for administration expenses,
- (3) for claims against the estate, and

(4) for unpaid mortgages upon, or any indebtedness in respect to, property where the value of decedent's interest therein, undiminished by such mortgage or indebtedness, is included in the value of the gross estate.

(c) *Property Previously Taxed*.—An amount equal to the value of any property (1) forming a part of the gross estate situated in the United States of any person who died within five years prior to the death of the decedent, or (2) transferred to the decedent by gift within five years prior to his death, where such property can be identified as having been received by the decedent from the donor by gift, or from such prior decedent by gift, bequest, devise, or inheritance, or which can be identified as having been acquired in exchange for property so received. Property includible in the gross estate of the prior decedent under section 811(f) and property included in total gifts of the donor under section 1000(c) received by the decedent described in this subsection shall, for the purposes of this subsection, be considered a bequest of such prior decedent or gift of such donor. This deduction shall be allowed only where a gift tax imposed under Chapter 4, or under Title III of the Revenue Act of 1932, 47 Stat. 245, or an estate tax imposed under this chapter or any prior Act of Congress, was finally determined and paid by or on behalf of such donor, or the estate of such prior decedent, as the case may be, and only in the amount finally determined as the value of such

That where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than an adequate and full consideration in money or money's worth, there shall be excepted, only such part of the value of such property as is proportionate to the consideration furnished by such other person; *Provided further*, That where any property has been acquired by gift, bequest, devise, or inheritance, as a tenancy by the entirety by the decedent and spouse, then to the extent of one-half of the value thereof, or, where so acquired by the decedent and any other person as joint tenants and their interests are not otherwise specified or fixed by law, then to the extent of the value of a fractional part to be determined by dividing the value of the property by the number of joint tenants.

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(b) *Expenses, Losses, Indebtedness, and Taxes*.—Such amounts—

- (1) for funeral expenses
- (2) for administration expenses,
- (3) for claims against the estate, and

(4) for unpaid mortgages upon, or any indebtedness in respect to, property where the value of decedent's interest therein, undiminished by such mortgage or indebtedness, is included in the value of the gross estate.

(c) *Property Previously Taxed*.—An amount equal to the value of any property (1) forming a part of the gross estate situated in the United States of any person who died within five years prior to the death of the decedent, or (2) transferred to the decedent by gift within five years prior to his death, where such property can be identified as having been received by the decedent from the donor by gift, or from such prior decedent by gift, bequest, devise, or inheritance, or which can be identified as having been acquired in exchange for property so received. Property includible in the gross estate of the prior decedent under section 811(f) and property included in total gifts of the donor under section 1000(c) received by the decedent described in this subsection shall, for the purposes of this subsection, be considered a bequest of such prior decedent or gift of such donor. This deduction shall be allowed only where a gift tax imposed under Chapter 4, or under Title III of the Revenue Act of 1932, 47 Stat. 245, or an estate tax imposed under this chapter or any prior Act of Congress, was finally determined and paid by or on behalf of such donor, or the estate of such prior decedent, as the case may be, and only in the amount finally determined as the value of such

property in determining the value of the gift, or the gross estate of such prior decedent, and only to the extent that the value of such property is included in the decedent's gross estate, and only if in determining the value of the net estate of the prior decedent no deduction was allowable under this subsection, section 861(a)(2), or the corresponding provisions of any prior Act of Congress, in respect of the property or property given in exchange therefor.

The following property shall not, for the purposes of this subsection, be considered as property with respect to which a deduction may be allowed: (A) property received from a prior decedent who died after December 31, 1947, and was at the time of such death the decedent's spouse, (B) property received by gift after the date of the enactment of the Revenue Act of 1948 from a donor who at the time of the gift was the decedent's spouse, and (C) property acquired in exchange for property described in clause (A) or (B).

Where, under the provisions of Section 1000(f), a gift received by the decedent was considered as made one-half by the donor and one-half by the donor's spouse, one-half of the gift shall be considered as received by the decedent for each such spouse.

Where a deduction was allowed of any mortgage or other lien in determining the gift tax, or the estate tax of the prior decedent, which was paid in whole or in part prior to the decedent's death, then the deduction allowable under this subsection shall be reduced by the amount so paid. The deduction under this subsection shall be

reduced by an amount which bears the same ratio to the amounts allowed as deductions under subsections (a), (d) and (e) and the amounts of general claims allowed as deductions under subsection (b) as the amount otherwise deductible under this subsection bears to property subject to general claims. If the property includible in the gross estate to which the deduction under this subsection is attributable is not wholly property subject to general claims—

(1) Before the application of the preceding sentence, the amount of the deduction under this subsection shall be reduced by that part of such amount as the value, at the time of the decedent's death, of such property (to which such deduction is attributable) subject to claims but not to general claims is of the value, at the time of the decedent's death, of such property, and

(2) in the application of the preceding sentence in reducing the balance, if any, of such deduction, "the amount otherwise deductible under this subsection" shall be only that part of such amount otherwise deductible (determined without regard to clause (1) of this paragraph) as the value, at the time of the decedent's death, of such property (to which such deduction is attributable) subject to general claims is of the value, at the time of the decedent's death, of such property.

For the purposes of the two preceding sentences and this sentence, "general claims" are the amounts al-

lowed as deductions under subsection (b) which, under the applicable law, in the final adjustment and settlement of the estate may be enforced against any property subject to claims, as defined in subsection (b), and "property subject to general claims" is the value, at the time of the decedent's death, of property subject to claims, as defined in subsection (b), reduced by the value, at the time of the decedent's death, of that part of such property against which amounts allowed as deductions under subsection (b) which are not general claims may be enforced, under the applicable law, in the final adjustment and settlement of the estate. Where the property referred to in this subsection consists of two or more items the aggregate value of such items shall be used for the purpose of computing the deduction.

(d) *Transfers for Public, Charitable, and Religious Uses.*

(e) *Bequests, etc., to Surviving Spouse.*

Sec. 827. LIEN FOR TAX.

(a) *Upon Gross Estate.*—Unless the tax is sooner paid in full, it shall be a lien for ten years upon the gross estate of the decedent, except that such part of the gross estate as is used for the payment of charges against the estate and expenses of its administration, allowed by any court having jurisdiction thereof, shall be divested of such lien. If the Commissioner is satisfied that the tax liability of an estate has been fully discharged or provided for, he may, under regulations prescribed by him with the approval of the

Secretary, issue his certificate, releasing any or all property of such estate from the lien herein imposed.

(b) *Liability of Transferee, Etc.*—If the tax herein imposed is not paid when due, then the spouse, transferee, trustee, surviving tenant, person in possession of the property by reason of the exercise, non-exercise, or release of a power of appointment, or beneficiary, who receives, or has on the date of the decedent's death, property included in the gross estate under section 811(b), (c), (d), (e), (f), or (g), to the extent of the value, at the time of the decedent's death, of such property, shall be personally liable for such tax. Any part of such property sold by such spouse, transferee, trustee, surviving tenant, person in possession of property by reason of the exercise, nonexercise, or release of a power of appointment, or beneficiary, to a bona fide purchaser for an adequate and full consideration in money or money's worth shall be divested of the lien provided in section 827(a) and a like lien shall then attach to all the property of such spouse, transferee, trustee, surviving tenant, person in possession, or beneficiary, except any part sold to a bona fide purchaser for an adequate and full consideration in money or money's worth.

No. 14,879

IN THE
United States Court of Appeals
For the Ninth Circuit

BANK OF AMERICA NATIONAL TRUST AND
SAVINGS ASSOCIATION, as Executor for
the Last Will and Testament of
THOMAS McDONOUGH, Deceased,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the Judgment of the United States District Court
for the Northern District of California.

BRIEF FOR THE APPELLEE.

CHARLES K. RICE,

Acting Assistant Attorney General.

LEE A. JACKSON,

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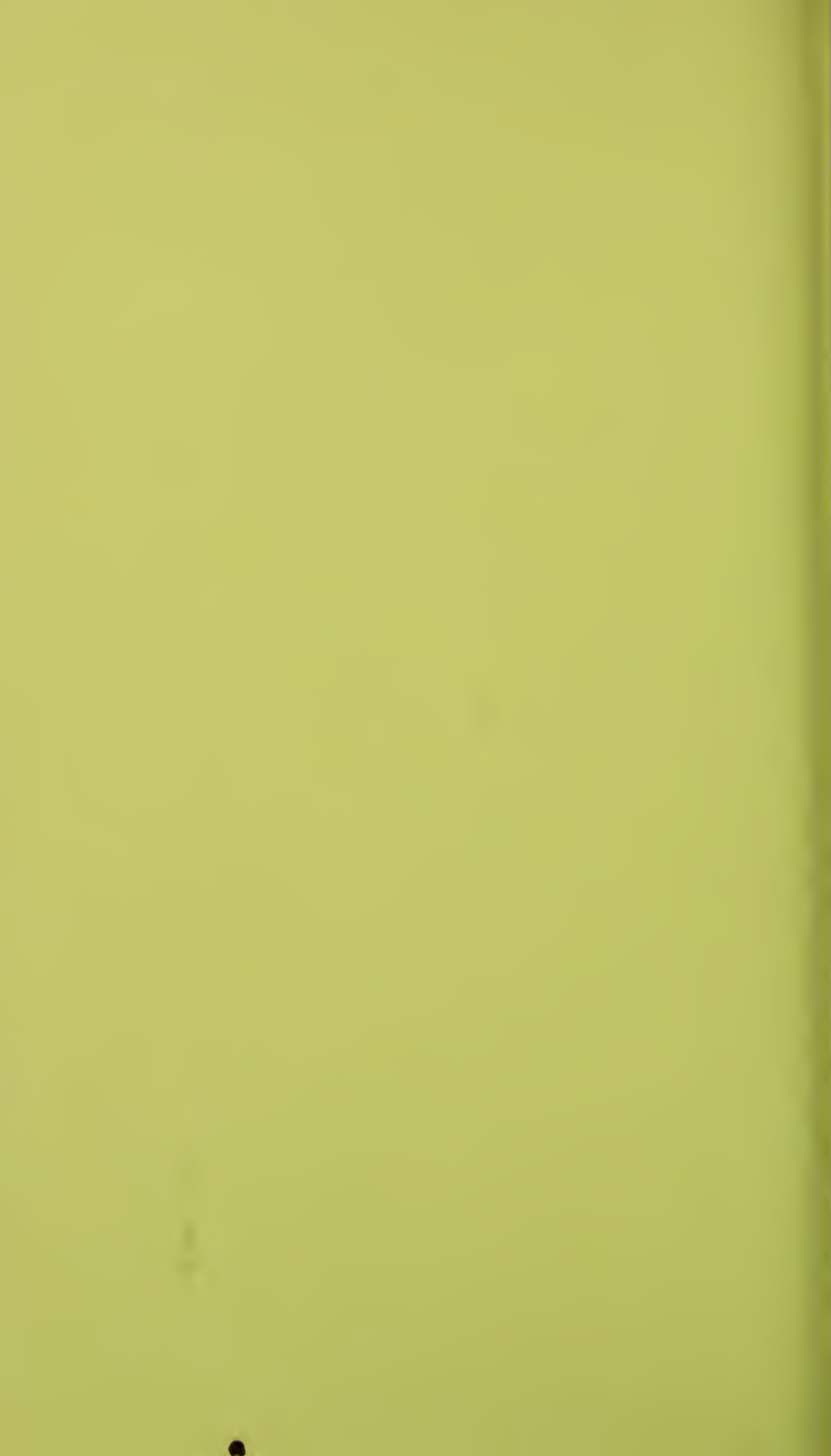
LLOYD H. BURKE,

United States Attorney.

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for the Northern District of California.

BRIEF FOR THE APPELLEE.

OPINION BELOW.

The opinion of the District Court (R. 71-74) is
reported at 130 F. Supp. 923.

JURISDICTION.

A claim for refund of estate tax, which was assessed
against, and paid by, the appellant as executor of
the estate of Thomas McDonough, was filed on April

21, 1952, and was denied by the Commissioner of Internal Revenue on March 3, 1953. (R. 75-76.) Thereafter, on May 8, 1953, within the time provided in Section 3772 of the Internal Revenue Code of 1939 a complaint based on such claim was filed by the appellant herein in the District Court for the Northern District of California pursuant to jurisdiction conferred by Section 1346 of 28 U.S.C. (R. 19.) The case was tried before the District Court and judgment was entered on June 20, 1955. (R. 79-80.) Within sixty days, the notice of appeal to this Court was filed on August 15, 1955. (R. 80.) Jurisdiction is conferred on this Court by 28 U.S.C., Section 1291.

QUESTION PRESENTED.

Whether the District Court correctly held that the deduction allowable under Section 812 (c) of the Internal Revenue Code of 1939 for property previously taxed in the prior decedent's estate should equal the net amount received from that estate, and that consequently such deduction should be computed by eliminating amounts paid out of the decedent's estate for taxes and other charges against the prior decedent's estate.

STATUTE INVOLVED.

The pertinent provisions of the statute involved are set forth in the Appendix, *infra*.

STATEMENT.

The facts as found by the District Court are as follows (R. 3-5, 75-78):

This is a suit to recover estate tax in the amount of \$40,249.05,¹ and was instituted by the Bank of America National Trust and Savings Association (appellant here) as executor of the estate of Thomas McDonough who died in San Francisco, California, on September 13, 1948. The executor filed an estate tax return with the Collector of Internal Revenue for the estate of such decedent on November 21, 1949, and at that time paid \$160,651.22, which was the amount of tax reported thereon. (R. 3-4, 75.)

On October 29, 1951, the Commissioner of Internal Revenue notified the executor that there was a deficiency in estate tax in the gross amount of \$26,173.64 or (after allowing a credit for the California inheritance tax) a net amount of \$8,516.75. This net amount was paid by the executor with interest on January 3, 1952. (R. 4-5, 75.)

The decedent's brother, Peter P. McDonough, died in San Francisco, California, on July 8, 1947, and at the time of his death owned certain property jointly with his brother Thomas. At Peter's death such jointly owned property passed by operation of California law to Thomas. But it is admitted that by virtue of Section 811 of the 1939 Internal Revenue

¹It will be noted that in its claim for refund taxpayer claimed that it was entitled to a refund of \$57,191.48. (R. 14.) But due to a recomputation attached to its complaint and marked Exhibit B (R. 18-19) taxpayer reduced the sum to \$40,249.05.

Code, Peter's gross estate subject to federal estate tax included one-half of the property held in joint tenancy. Consequently, when the executor here (being administrator of Peter's estate) filed an estate tax return for Peter's estate, it included one-half of the value of the jointly owned property held by the two brothers. Upon final audit by the Commissioner the value of Peter's one-half interest was determined to be \$577,971.92 and the executor here, as administrator of Peter's estate, acquiesced in such valuation. (R. 5-6, 75-76.)

The allowable deductions from Peter's gross estate amounted to \$27,093.53 and the total federal estate tax assessed against Peter's estate was \$149,289.84. The state inheritance tax attributable to such estate amounted to \$49,263.81 and there were net specific legacies to others than Thomas in the amount of \$39,116.47. The net value of the jointly owned property to which Thomas succeeded by virtue of Peter's death was \$373,910.01. Such figure was the result of subtracting the figures listed in this paragraph from Peter's gross estate of \$638,673.66. (R. 76.)

When Thomas McDonough died on September 13, 1948, the administration of his brother's estate had not been completed and on that date all of the jointly owned property included in Peter's estate was identifiable in that of Thomas' except for one item of the net value of \$15.23. Thus the net adjusted value of the jointly owned property which had been included in the prior estate and which was also included in Thomas' estate was \$373,894.78. (R. 76-77.)

Although all but that small item of the jointly owned property was identifiable at Thomas' death, such property was subject to a lien for \$141,686.05, which was the portion of the federal estate tax on Peter's estate attributable to the jointly owned property. That figure was approved and used by the executor in preparing the estate tax return to be filed on behalf of Thomas' estate. Thus the net amount of Peter's portion of the jointly owned property (i.e., the amount to be included in Thomas' estate) was determined by the executor to be the value of such property at Thomas' death minus the amount of \$141,686.05 or \$444,033.18. But the District Court, sustaining the Commissioner's determination, found that the net value of such property was \$373,894.78. (R. 77-78.)

The District Court concluded as a matter of law that, in computing the estate tax liability of the estate of Thomas McDonough, the Commissioner had properly determined the deduction allowed by the law for property previously taxed to be its net value, and that the executor was not entitled to recover. (R. 78.)

SUMMARY OF ARGUMENT.

The sole issue here is whether, in computing the deduction allowable for property previously taxed in the estate of the decedent's brother, amounts paid out of the decedent's estate for estate taxes and other charges against the brother's estate should be subtracted from the value of the property received. The

District Court held that such amounts should be subtracted.

This case arises under Section 812 (c) of the 1939 Internal Revenue Code which allows a deduction from a decedent's estate for property which has formed a part of the estate of a prior decedent dying within the past five years and which has not only been received from the prior decedent by bequest, devise or inheritance but can also be identified as a part of the decedent's estate. (Appellant asserts that this section should be interpreted in such a way as to permit a deduction for the entire value of the property (i.e., as included in the prior decedent's estate), without reduction for debts and claims to which the property is subject. But this contention ignores important facts here and does not give due emphasis to the provision that the deduction is to be limited to an amount equal to the value of the property actually received by inheritance.

The facts here show that the decedent received upon his brother's death the latter's share of their jointly owned property, but such property came to the decedent burdened with tax liens and other charges which were paid out of decedent's estate. Thus the net amount was all that the decedent received by inheritance, i.e., the amount by which the value of the property (as included in the brother's estate) exceeded the amount of the taxes and other charges paid by the decedent's executors out of his estate. This conclusion is not only a fair interpretation of the statute but is in accord with the applicable decisions.

ARGUMENT.

THE DISTRICT COURT CORRECTLY HELD THAT THE AMOUNT OF THE DEDUCTION CLAIMED HERE FOR PROPERTY PREVIOUSLY TAXED SHOULD BE LIMITED TO THE NET VALUE OF THE PROPERTY RECEIVED FROM THE PRIOR DECEDENT'S ESTATE.

The only issue in this case relates to the proper amount to be allowed under Section 812 (c) of the 1939 Internal Revenue Code (Appendix, *infra*) as a deduction from the gross estate of Thomas McDonough for property previously taxed in the estate of his brother Peter.

When Peter McDonough died on July 8, 1947, his one-half interest in the property held in joint tenancy with his brother Thomas vested in the latter and was valued, for the purpose of determining Peter's gross estate, at \$577,971.92. Before the administration of Peter's estate was completed, Thomas died on September 13, 1948, and the estate taxes as well as certain other charges, were paid out of the assets in Thomas' estate. Subsequently, in computing the tax on Thomas' estate, appellant, as executor, claimed the right to deduct \$577,971.92 as the value of property previously taxed in Peter's estate. The Commissioner did not agree but held that the amount allowable for property previously taxed was \$373,894.78. Such figure was obtained by subtracting from Peter's gross estate (\$638,673.66) the following items: \$27,093.53 for deductions claimed and allowed in computing Peter's net estate; \$149,289.84 for federal estate tax on Peter's estate; \$49,263.81 for California inheritance tax on the same estate; and \$39,116.47 for net

specific legacies to others than Thomas McDonough. (R. 65.)² The District Court adopted (R. 71, 77) the Commissioner's determination and we submit that its decision is correct.

Code Section 812 (c) provides that, in computing the net estate of a decedent, a deduction shall be allowed in an amount equal to the value of the property forming a part of the gross estate of a person who has died within the past five years. The allowance of this deduction is made subject to a number of conditions and limitations. These include the requirement that such property be identified as having been received by the decedent from the prior decedent by gift, bequest, devise or inheritance.³ It is also necessary to show that an estate tax was finally determined and paid by or on behalf of the prior decedent's estate. Section 812 (c) further provides that the deduction shall be allowed only in the amount finally determined as the value of such property in determining the gross estate of the prior decedent, and only to the extent that the value of such property is included in the decedent's gross estate.

²To get the figure determined by the Commissioner, \$15.23 should also be subtracted from the gross amount of \$638,673.66. As the District Court explained (R. 77) this is a necessary adjustment because of a failure to identify a small item as property previously taxed.

³Appellant admits that although the property involved here vested in Thomas McDonough by operation of law and not under Peter's will the former took by inheritance. As we shall point out, we agree but only to the extent that the value of such property exceeds the charges against Peter's estate which were paid out of Thomas' estate.

In applying Section 812 (c) to this case, appellant emphasizes the last provisions we have just referred to, and asserts that, since the property comprising Peter's share of the jointly owned property was identifiable (with one minor exception) in Thomas' estate, the amount of the deduction should be the entire value given to such property in determining Peter's gross estate. We cannot agree because such contention not only ignores important facts involved here but also fails to give due emphasis to the provision in the above section that a deduction for property previously taxed must be limited to property received from the prior estate "by gift, bequest, devise, or inheritance". Of course, as we have pointed out in footnote 3, *supra*, appellant takes the position that the property came to Thomas by inheritance, but in doing so does not recognize that all that Thomas received by inheritance was the net amount determined by the Commissioner and the District Court.

In many cases the problem here does not arise because ordinarily the estate tax is paid out of the prior decedent's estate and legacies are then distributed. Thus the typical case may be said to be one in which A leaves a gross estate of \$600,000 with estate tax and other charges against it in the amount of \$200,000. The estate tax and other charges are paid out of such estate and the remaining property is distributed to B, to whom it goes by inheritance. If B dies within five years it is obvious that the deduction on account of property previously taxed in A's estate is \$400,000. But the situation is not mate-

rially different if we take the same facts except that before the taxes and other charges against A's estate are paid all of the property in that estate is distributed to B and, after B's death, the taxes and other charges against A's estate are paid out of B's estate. We submit that in the latter case the deduction for property previously taxed should also be only \$400,000.

Our second illustration is similar to the facts here. Thus, while Thomas received property which was valued in his brother's estate at \$577,971.92, and that property was still in Thomas' estate at his death, such property came to him burdened with liens⁴ and other charges which in effect brought the actual value of what he received down to that determined by the Commissioner. There can be no doubt about this for, as we have already pointed out, Peter's gross estate was valued at \$638,673.66 and taxes, specific legacies and other charges against such estate amounted to \$264,763.65. (R. 65.) Obviously, when such charges are subtracted from the gross estate, the value of what was left for Thomas (with the minor adjustment indicated above) was \$373,894.78.

In other words, it is apparent from the figures given above that Peter's gross estate exceeded the

⁴Section 827 of the Code (Appendix, *infra*) imposes a lien upon the gross estate of a decedent for ten years. That lien attached to Peter's estate, and the property which Thomas received was subject to such lien. A similar situation existed as to the California inheritance tax, and it is understood that appellant agreed to and did pay that portion of the specific legacies which could not be paid because of the lack of funds out of Peter's gross estate, i.e., out of the portion not included in Peter's share of the jointly owned property.

value placed on his share of the jointly owned property by only \$60,701.74, and such sum was not sufficient to pay all of the debts. Thus the remaining taxes and charges amounting to \$204,061.91 would normally have been paid out of what was left in Peter's estate, namely, his share of the jointly owned property, and had that been done before Thomas' death there could have been no question here that what Thomas received by inheritance from Peter amounted to only \$373,894.78. But the administration of Peter's estate had not been completed when Thomas died, and Thomas and the appellant apparently thought it was advantageous to keep Peter's share of the jointly owned property intact in Thomas' estate. At any rate, the property was retained and the appellant decided to pay the taxes and other charges against Peter's estate out of Thomas' estate. But, by so doing, the appellant did not enlarge the actual amount of property previously taxed which was received by Thomas by inheritance.

In attempting to sustain its contention, appellant calls attention to one statement by the Commissioner (R. 65) in which the figure \$373,894.78 is referred to as a "Theoretical balance" of property previously taxed. We are of the opinion that the more accurate description is that such figure represents the actual value of what Thomas received by gift or inheritance from his brother; and it is the figure which the Commissioner actually allowed. (R. 63, 71.) Certainly, regardless of how such figure is described, it is the proper one to use as a basis for the claimed deduction

and in making the remaining computations, including the reductions which are authorized by Section 812 (c) and which will necessarily follow after the issue here is decided but which, as appellant points out (Br. 5), are not involved in this case.

Under facts similar to those here the courts have held that the deduction for previously taxed property is limited to the net amount received, i.e., the amount of the bequest or gift after payment of all debts and other charges thereon, including federal estate taxes. See *Bloedorn v. United States*, 116 F. Supp. 132 (C. Cls.); *Central Hanover B. & T. Co. v. Commissioner*, 159 F. 2d 167 (C.A. 2d); *Bahr v. Commissioner*, 119 F. 2d 371 (C.A. 5th), certiorari denied, 314 U.S. 650; *McCarthy v. Delaney*, 76 F. Supp. 471 (Mass.); and *Estate of Ackley v. Commissioner*, 23 T.C. 639. Also cf. *Ransbottom's Estate v. Commissioner*, 148 F. 2d 280 (C.A. 6th).

In the *Central Hanover* case, *supra*, assets were distributed to a widow, as the sole legatee of her husband, before payment of the latter's debts and these were subsequently paid by the widow. At the widow's death within five years there was a large amount of property identifiable as having been received from the husband's estate. The executor claimed the right to deduct the entire value of such property, (as determined for the husband's estate) as property previously taxed, but the Commissioner determined that the widow had received only $63\frac{1}{3}$ per cent of each asset by bequest and thus limited the deduction ac-

cordingly. In upholding this determination, the Court of Appeals said (p. 168) :

The question is whether by "identity" the statute means the physical identity of the asset, or the identity of the legatee's financial interest in it. The Tax Court held that the debts were in effect liens or charges upon all the husband's assets, to be ratably allocated, and that he bequeathed and could bequeath to his wife only an interest in each asset measured by its value less its proportion of the debts as a whole. * * *

It seems to us that this is the proper interpretation of the section. It is of no consequence whether the debts were liens in a formal sense upon the husband's assets, it is enough that, if the wife did not pay them, the creditors could follow them and sell them on execution. The record is not clear, but apparently she used her own funds to pay the debts, and by so doing she acquired the creditors' interest which she had not had before, and which had never been bequeathed to her. On the other hand, if she sold some of the assets to pay the debts, the situation was the same: she parted with her bequeathed interest in those she sold and used the proceeds to secure the creditors' interest in the rest. We cannot see why either situation was different from an executor's sale of, or a creditor's levy upon, an asset before distribution was made.

Another excellent statement appears in the *Bloedorn* case, *supra*, in which a widow was also the sole legatee of her husband and paid the estate tax on his estate out of her own funds. She too died within

five years and owned at her death all of the property she had inherited from him. It was claimed there that the amount paid as estate tax by the widow should not be subtracted in computing the deduction for property previously taxed but the Court of Claims held otherwise, stating (p. 134):

We think that the only thing that could have engaged the attention of Congress in enacting the legislation here in question was the net amount which the second decedent had received from the first decedent, which net amount, or its proceeds, remained in the estate of the second decedent when he died within five years after the death of the first decedent. The question whether the second decedent paid the tax out of his own funds * * * or out of the assets of the estate, would depend, apart from its effect upon the tax question, upon collateral circumstances. * * * If it seemed important not to sell the investments which the first decedent had, the heir would pay the tax out of his own liquid funds if he had such funds. * * *

* * * * *

We do not think that Congress had any intention of discriminating in favor of a well-financed heir, merely because he was so well-financed that he could not only pay out of his own funds the tax on the estate of the first decedent, but would not find it necessary, over a five-year period, to reimburse himself for the money so paid. * * * We think it would be unfair to the legislature to attribute to it an intention which could only be described as erratic.

* * * * *

There is here no problem of double taxation except in a merely formal and unsubstantial sense. As much of net worth as accrued to Rose L. Sutherland and her estate from the estate of her husband, after deducting the taxes paid by her from her own funds in order to get title to the estate of her husband, has been allowed as a deduction from her gross estate, in computing its taxes.

The *Bahr* case, *supra*, also reached the same conclusion under similar facts. But in *Thomas v. Earnest*, 161 F. 2d 845, on which appellant relies here, the Fifth Circuit, although stating (p. 848) that it was following the majority opinion in the *Bahr* case, modified its former ruling by holding that the federal estate tax should not be deducted in computing the deduction for property previously taxed. However, it should be noted that the Fifth Circuit was still of the opinion that the prior decedent's gross estate should be reduced by debts, expenses, and state inheritance taxes in determining the amount of property previously taxed.

Another case which appellant relies on is *Commissioner v. Garland*, 136 F. 2d 82 (C.A. 1st), but there are some distinguishing facts in that case. There too the widow was the decedent and her husband was the prior decedent. The debts, taxes and expenses of the prior decedent's estate amounted to approximately \$100,000 of which about \$51,000 was paid out of the corpus of his estate and another \$35,000 was paid out of income and capital gains

realized by his estate while still in the process of administration. The remaining property was then distributed to the widow and at her death the remainder of the debts against her husband's estate (i.e., \$14,000) remained unpaid. The executor for the widow's estate conceded that, to the extent of the \$14,000 debt, the property distributed to her had not been received by bequest, devise or inheritance. The reason for such concession is stated in *Estate of Garland v. Commissioner*, 46 B.T.A. 1243, 1246, as being that "the decedent in effect was required to return that amount of the assets of the prior decedent's estate after they had been distributed to her". The First Circuit, in commenting on such concession, admitted (p. 84) that the Board of Tax Appeals may have been correct in its conclusion as to the reason just given but explained that it was not required to pass upon the propriety of the executor's concession. Thus it is clear that the only question presented in the *Garland* case was whether the deduction for property previously taxed should be reduced by the \$35,000 which the widow had disbursed from the income of her husband's estate in payment of his debts. That question was decided in the executor's favor by the Tax Court, whose decision was affirmed on appeal. Were the question to arise again, its decision would undoubtedly be different. See *Estate of Ackley v. Commissioner*, *supra*, p. 645.

In support of the position taken here, see also *The Estate Tax Deduction For Property Previously Taxed*, by Henry J. Rudick, 53 Col. L. Rev. 761, in

which that well known commentator on federal tax law asserts that the object of the statutory provision involved here is accomplished (i.e., prevention of a double tax on the same property) if the second estate is limited in its deduction to what would have qualified for the property previously taxed deduction had the prior estate completely discharged its obligations out of the original corpus of the estate and then turned over what was left to the legatee. That, Mr. Rudick asserts, is all the legatee can claim as having been received by way of bequest or inheritance and anything received beyond that is from other sources. This is essentially the rationale of the *Central Hanover, Bahr, Bloedorn*, and *Ackley* decisions, *supra*. The opinions in those cases furnish a complete answer to appellant's argument.⁵

In commenting on the cases on which we rely, appellant refers to their failure to discuss the provision in Section 812 (c) relating to mortgages or similar liens which attach to property of a prior decedent before his death. Moreover, it ignores the applicable

⁵In lieu of the deduction allowed by 1939 Code Section 812(c) for property previously taxed, Section 2013 of the Internal Revenue Code of 1954 allows a credit measured by the amount of estate tax paid with respect to property received from the prior decedent. Significantly, with reference to the replaced provision (1939 Code Section 812 (c)), the House Committee Report stated (H. Rep. No. 1337, 83d Cong., 2d Sess., p. 89) :

Present law allows a deduction for property received from a prior decedent (or by gift subject to tax) within 5 years of the current decedent's death * * *. *The deduction is reduced if the property is subject to a debt or claim* and no deduction is allowable if the property was received from the current decedent's spouse. [Italics supplied.]

Treasury regulation (Sec. 81.41 of Treasury Regulations 105, promulgated under the Internal Revenue Code of 1939) and quotes the regulation applicable to deductions allowable under Section 812(b)(4) for unpaid mortgages. (Br. 17-18, 22-23.) We do not think it necessary to discuss these provisions, for obviously the liens and other charges involved here all arose subsequent to Peter's death, with the exception of some items included in deductions in the total amount of \$27,093.53 (R. 65) about which appellant has raised no question.

Moreover, it should be clear that Peter's estate and inheritance taxes, as well as the specific legacies to others than his brother Thomas, cannot be taken as deductions on Thomas' estate tax return under Code Section 812(b) (Appendix, *infra*), as appellant seems to assume. (Br. 17.) Such items, as we have pointed out, were all debts of Peter's estate. Furthermore, as the issue raised in appellant's claim for refund (R. 13-15) is confined to the issue discussed herein, and as appellant admits (Br. 5) that the "sole issue" here relates to the initial evaluation of the deduction for property previously taxed, we submit that no question can properly be considered here as to the deductions which might have been taken on Thomas' estate tax returns under Section 812(b).

CONCLUSION.

The decision of the District Court is correct and should be affirmed.

Respectfully submitted,

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February, 1956.

(Appendix Follows.)

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Appendix.



Appendix

Internal Revenue Code of 1939:

SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent, shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

(a) *Decedent's Interest*.—To the extent of the interest therein of the decedent at the time of his death;

* * * * * *

(e) *Joint Interests*.—To the extent of the interest therein held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, or deposited, with any person carrying on the banking business, in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth: *Provided*, That where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than an adequate and full consideration in money or money's worth, there shall be

excepted only such part of the value of such property as is proportionate to the consideration furnished by such other person: * * *

* * * * *

(26 U.S.C. 1952 ed., Sec. 811.)

SEC. 812. NET ESTATE.

For the purpose of the tax the value of the net estate shall be determined, in the case of a citizen or resident of the United States by deducting from the value of the gross estate—

(a) *Exemption*.—An exemption of \$100,000;

(b) *Expenses, Losses, Indebtedness, and Taxes*.—Such amounts—

(1) for funeral expenses,

(2) for administration expenses,

(3) for claims against the estate,

(4) for unpaid mortgages upon, or any indebtedness in respect to, property where the value of decedent's interest therein, undiminished by such mortgage or indebtedness, is included in the value of the gross estate, and as are allowed by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered, but not including any income taxes upon income received after the death of the decedent, or property taxes not accrued before his death, or any estate, succession, legacy, or inheritance taxes. * * *

* * * * *

(c) [as amended by Secs. 405(b) and 407(a)(1) and (2) of the Revenue Act of 1942, c. 619, 56 Stat. 798, and Sec. 362 of the Revenue Act of 1948, c. 168, 62 Stat. 110] *Property Previously Taxed.*—An amount equal to the value of any property (1) forming a part of the gross estate situated in the United States of any person who died within five years prior to the death of the decedent, or (2) transferred to the decedent by gift within five years prior to his death, where such property can be identified as having been received by the decedent from the donor by gift, or from such prior decedent by gift, bequest, devise, or inheritance, or which can be identified as having been acquired in exchange for property so received. Property includible in the gross estate of the prior decedent under section 811 (f) and property included in total gifts of the donor under section 1000(c) received by the decedent described in this subsection shall, for the purposes of this subsection, be considered a bequest of such prior decedent or gift of such donor. This deduction shall be allowed only where a gift tax imposed under Chapter 4, or under Title III of the Revenue Act of 1932, 47 Stat. 245, or an estate tax imposed under this chapter or any prior Act of Congress, was finally determined and paid by or on behalf of such donor, or the estate of such prior decedent, as the case may be, and only in the amount finally determined as the value of such property in determining the value of the gift, or the gross estate of such prior decedent, and only to the extent that the value of such property is included in the

decedent's gross estate, and only if in determining the value of the net estate of the prior decedent no deduction was allowable under this subsection, section 861(a)(2), or the corresponding provisions of any prior Act of Congress, in respect of the property or property given in exchange therefor.

The following property shall not, for the purposes of this subsection, be considered as property with respect to which a deduction may be allowed: (A) property received from a prior decedent who died after December 31, 1947, and was at the time of such death the decedent's spouse, (B) property received by gift after the date of the enactment of the Revenue Act of 1948 from a donor who at the time of the gift was the decedent's spouse and (C) property acquired in exchange for property described in clause (A) or (B).

Where, under the provisions of Section 1000(f), a gift received by the decedent was considered as made one-half by the donor and one-half by the donor's spouse, one-half of the gift shall be considered as received by the decedent from each such spouse.

Where a deduction was allowed of any mortgage or other lien in determining the gift tax, or the estate tax of the prior decedent, which was paid in whole or in part prior to the decedent's death, then the deduction allowable under this subsection shall be reduced by the amount so paid. The deduction under this subsection shall be reduced by an amount which bears the same ratio to the amounts allowed as deductions under subsections (a), (d), and (e) and the amounts

of general claims allowed as deductions under subsection (b) as the amount otherwise deductible under this subsection bears to property subject to general claims. If the property includible in the gross estate to which the deduction under this subsection is attributable is not wholly property subject to general claims—

(1) before the application of the preceding sentence, the amount of the deduction under this subsection shall be reduced by that part of such amount as the value, at the time of the decedent's death, of such property (to which such deduction is attributable) subject to claims but not to general claims is of the value, at the time of the decedent's death, of such property, and

(2) in the application of the preceding sentence in reducing the balance, if any, of such deduction, "the amount otherwise deductible under this subsection" shall be only that part of such amount otherwise deductible (determined without regard to clause (1) of this paragraph) as the value, at the time of the decedent's death, of such property (to which such deduction is attributable) subject to general claims is of the value, at the time of the decedent's death, of such property.

For the purposes of the two preceding sentences and this sentence, "general claims" are the amounts allowed as deductions under subsection (b) which, under the applicable law, in the final adjustment and settlement of the estate may be enforced against any property subject to claims, as defined in subsection

(b), and “property subject to general claims” is the value, at the time of the decedent’s death, of property subject to claims, as defined in subsection (b), reduced by the value, at the time of the decedent’s death, of that part of such property against which amounts allowed as deductions under subsection (b) which are not general claims may be enforced, under the applicable law, in the final adjustment and settlement of the estate. Where the property referred to in this subsection consists of two or more items the aggregate value of such items shall be used for the purpose of computing the deduction.

(d) *Transfers for Public, Charitable, and Religious uses.*—* * *

(e) [as added by Sec. 361 of the Revenue Act of 1948, *supra*] *Bequests, Etc., to Surviving Spouse.*—
* * * * *

(26 U.S.C. 1952 ed., Sec. 812.)

SEC. 827. LIEN FOR TAX.

(a) *Upon Gross Estate.*—Unless the tax is sooner paid in full, it shall be a lien for ten years upon the gross estate of the decedent, except that such part of the gross estate as is used for the payment of charges against the estate and expenses of its administration, allowed by any court having jurisdiction thereof, shall be divested of such lien. If the Commissioner is satisfied that the tax liability of an estate has been fully discharged or provided for, he may, under regulations prescribed by him with the approval of the Secretary, issue his certificate, releasing any

or all property of such estate from the lien herein imposed.

(b) [as amended by Sec. 411(a) of the Revenue Act of 1942, *supra*] *Liability of Transferee, Etc.*—If the tax herein imposed is not paid when due, then the spouse, transferee, trustee, surviving tenant, person in possession of the property by reason of the exercise, nonexercise, or release of a power of appointment, or beneficiary, who receives, or has on the date of the decedent's death, property included in the gross estate under section 811(b), (c), (d), (e), (f), or (g), to the extent of the value, at the time of the decedent's death, of such property shall be personally liable for such tax. Any part of such property sold by such spouse, transferee, trustee, surviving tenant, person in possession of property by reason of the exercise, nonexercise, or release of a power of appointment, or beneficiary, to a bona fide purchaser for an adequate and full consideration in money or money's worth shall be divested of the lien provided in section 827 (a) and a like lien shall then attach to all the property of such spouse, transferee, trustee, surviving tenant, person in possession, or beneficiary, except any part sold to a bona fide purchaser for an adequate and full consideration in money or money's worth.

* * * * *

(26 U.S.C. 1952 ed., Sec. 827.)



No. 14,879

United States Court of Appeals
For the Ninth Circuit

BANK OF AMERICA NATIONAL TRUST
AND SAVINGS ASSOCIATION, as Exec-
utor of the Last Will and Testament
of Thomas McDonough, deceased,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF.

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FILE

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United States Court of Appeals For the Ninth Circuit

BANK OF AMERICA NATIONAL TRUST
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utor of the Last Will and Testament
of Thomas McDonough, deceased,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF.

Before answering the arguments of the Government, certain facts, especially with respect to the factors required to be used in computing the deduction for property previously taxed under Section 812(c) of the Internal Revenue Code of 1939, must be emphasized, and the particular issues involved in this case pinpointed.

On page 4 of its brief the Government states:

“The net value of the jointly owned property to which Thomas succeeded by virtue of Peter’s death was \$373,910.01. Such figure was the result of subtracting the figures listed in this paragraph from Peter’s gross estate of \$638,673.66.”

The mathematical computation referred to is—

Peter's gross estate		\$638,673.66
Less:		
Federal Estate Tax	\$149,289.84	
State Inheritance Tax	49,263.81	
Allowable deductions		
{Debts	\$13,633.49	
{Admin. exp.	13,460.04	27,093.53
		<hr/>
(R. 40)		
Specific Legacies	39,116.47	
		<hr/>
Total reduction		264,763.65 ¹
		<hr/>
Net		\$373,910.01

Peter's interest in the joint tenancy property was included in the above gross estate figure of \$638,673.66 at a value of \$577,971.92.

The Government's conclusion is correct as a matter of mathematical computation, but it is not correct as a legal conclusion or statement of fact.

Under California law, joint tenancy property is not part of the probate estate and therefore is not subject to the debts and expenses of the estate. (*Estate of Fritz* (1933), 130 C.A. 725, 20 P.(2d) 361; *Estate of Dow* (1947), 82 C.A.(2d) 675, 679-680, 186 P.(2d) 977; *Estate of Gurnsey* (1918), 177 C. 211, 170 Pac. 402; *Ziegler v. Bonnell* (1942) 52 C.A. (2d) 217, 126 P.(2d) 118). The share of the joint tenancy property acquired by the surviving joint tenant upon death of a joint tenant is chargeable by specific statutory pro-

¹Only the item of \$27,093.53 out of this total was allowed or allowable as deductions from the gross estate in determining Peter's net taxable estate.

vision for unpaid inheritance tax imposed upon that "transfer" and also federal estate tax. (California Revenue and Taxation Code Sections 14301, 14121 and 14143, as to California Inheritance tax; California Probate Code Article IV(a), Section 975, and Section 827 Internal Revenue Code of 1939, relating to Federal Estate tax.)

The California Probate Code specifies the order in which estate assets are to be used in payment of estate expenses and charges, as follows:

- (1) Expenses of Probate Administration
- (2) Funeral expenses
- (3) Debts having preference by laws of the United States
- (4) Expenses of last illness
- (5) Family allowance
- (6) Wages up to \$200, etc.
- (7) Mortgages and other liens in order of priority
- (8) Judgments against decedent during lifetime
- (9) All other demands.

(Section 950, Probate Code excepting the insertion of Item 3 above which is based upon judicial decision—*Muldoon Est.* (1954), 128 C.A.(2d) 284, 275 P.(2d) 597. Each of the above classes must be completely satisfied before the next class is entitled to any payment. *Stambach v. Emerson* (1902), 69 P. 856.)

It is obvious that under California law the Government is wrong in its conclusion (pp. 10-11 of its brief)

that assuming Peter's gross estate exceeded the value placed on his share of the jointly owned property by only \$60,701.74, "the remaining taxes and charges amounting to \$204,061.91 would normally have been paid out of what was left in Peter's estate, namely, his share of the jointly owned property". The estate balance would have been applied first to payment of the deductible administration expenses (\$27,093.53) and then to the taxes, and the unpaid balance of the taxes would have been chargeable against the joint property. The specific legacies are not charges against the jointly owned property. Whatever the unpaid balance chargeable against the joint property might be, those charges are allowable deductions in the Estate of Thomas (Sec. 812(b)(4)) and the only items so recognized and allowed as deductions in computing the estate tax against Thomas' estate was the unpaid federal estate tax item of \$141,592.71. If the Government is now arguing that the charges against the jointly owned property were \$204,061.91, it should be ready to concede that additional deductions are allowable to the Estate of Thomas for the difference between the \$204,061.91 and the amount of \$141,592.71 actually allowed.² The fact is, however, that the only unpaid

²In the computation of the property previously taxed deduction the Government determined that the identified fair market value in the Estate of Thomas of the property previously taxed in Peter's estate was \$585,719.23 which the Government then reduced by the federal estate tax of \$141,592.71 to arrive at \$444,126.52 as its conclusion as to the property previously taxed included in Thomas' gross estate. (R. 63, line (a), R. 61.) This is not consistent with the Government's contentions that the only previously taxed property acquired by Thomas was \$373,894.78. The Government's contentions are at variance with its own computations, with the stipu-

amount which constituted a charge against the property was the unpaid federal estate tax of \$141,592.71.

In this case the District Court found that

“Although on the date of death of Thomas McDonough all of the jointly owned property included in the prior estate, except the aforesaid item of property valued at \$23.30, was identifiable in the estate of Thomas McDonough, such property was subject to the lien of unpaid federal estate taxes of the prior estate attributable to such jointly-owned property in the sum of \$141,592.71”.

There is no finding that any other amounts were liens or charges against the property, and no other amounts were claimed as deductions on the estate tax return of Thomas. If there were any other amounts which were charges against the property, as the Government now infers, then they would have been so reported on the estate tax return, or the Government would have allowed them as additional deductions when the return was audited by the Revenue Agents. The true answer is, as the District Court in effect found to be the fact as established by the record, that the only charge against the jointly owned property in Thomas' estate was the only unpaid item of federal estate tax of \$141,592.71 against Peter's estate.

Since the joint tenancy property is not chargeable for any of the debts and expenses of Peter's estate,

lation which is consistent with the above referred to computation (R. 24, 77, 78), and with the requirements of Section 812(c) as to the factors to be used.

excepting the taxes, and since the finding of the District Court and the audit of the Estate Tax Return by the Revenue Agents, indicate that the only charge against the joint tenancy property acquired by the surviving joint tenant was the unpaid federal estate tax of \$141,592.71, it necessarily follows that the net value of the jointly owned property to which Thomas succeeded by virtue of Peter's death was the value of Peter's interest therein of \$577,971.92 less the only item charged against it of \$141,592.71 for federal estate tax, or a net of \$436,379.21, and not the amount of \$373,910.01 as claimed by the Government.

Although it is important to the *ultimate* determination of the deduction for property previously taxed, as will hereinafter be discussed in connection with the application of the fourth paragraph of Section 812(c), the "*net value* of the jointly owned property to which Thomas succeeded" is immaterial to, and not a factor specified in, Section 812(c) in determining the *initial identifiable value* of the property previously taxed. It is the determination of the initial identifiable valuation which is primarily the issue in this case. The prescribed factors to be used in making such determination are clearly expressed in the language used in Section 812(c).

FACTOR 1.

The first factor prescribed in Section 812(c) of the Internal Revenue Code of 1939, as the allowable deduction for property previously taxed, is "the amount finally determined as the value of such property in

determining the gross estate of such prior decedent * * *".

It is stipulated in this case that the value of the jointly owned property acquired by the present decedent from the prior decedent was included in the gross estate of the prior decedent at an amount finally determined to be \$577,971.92 (R. 23, 40, 76). However, the Government's contention, sustained by the District Court, is that this figure should be \$373,894.78.

FACTOR 2.

The second factor limits the first factor "to the extent that the value of such property is included in the decedent's gross estate," thus providing, in effect, that the lesser of the two factors shall be the allowable deduction for property previously taxed.

It is stipulated that "*the gross value of the property jointly owned by Peter F. McDonough and Thomas McDonough included and identified in the Estate of Thomas McDonough at the date of his death as having been received by him from the said Peter F. McDonough without taking account of the proportionate amount of the federal estate tax in the Estate of Peter F. McDonough attributable to said jointly-owned property was the sum of \$585,719.23*". (R. 24, 77, 78).

This gross value of \$585,719.23 is the amount which is properly includible in Thomas McDonough gross estate notwithstanding that on the estate tax return for said estate the liability for federal estate tax

against the estate of Peter McDonough of \$141,686.05³ was erroneously netted against the \$585,719.23 and only the net of \$444,033.18³ reported as “gross estate.” The \$585,719.23 should have been reported as part of the gross estate, and the \$141,686.05 lien against the property for the tax liability should have been shown amongst the deductions. (See Appellant’s opening brief, pp. 17-19). However, the Government’s contention sustained by the District Court, is that the gross estate valuation of the property in the estate of Thomas is the net amount of \$444,126.52.

FACTOR 3.

The third factor is the factor for adjustments required by the fourth paragraph of Section 812(c), and it has been stipulated that these adjustments will be made by the parties hereto after the issues involved are decided (R. 24).

ISSUE WITH RESPECT TO FACTOR 1.

Page 63 of the Record contains a schedule marked Exhibit A, showing how the Government computed the deduction for the property previously taxed, and showing the Government’s determination of the factors hereinabove discussed as Factors 1 and 2.

Line (b) of the schedule on page 63 of the Record, shows as “Gross PPT (property previously taxed)

³Corrected by Government audit to \$141,592.71 and \$444,126.52, respectively.

\$373,894.78", and by asterisk refers to the schedule on page 65 of the record showing how the \$373,894.78 is computed. This schedule on page 65 shows that the \$373,894.78 is nothing more than a calculation of Peter's gross estate less the aggregate of deductions, federal estate taxes, inheritance taxes and specific legacies (see Record p. 40 showing the Government's final determination of Peter's gross estate and net estate), and the Government then calls this the "Theoretical balance of property previously taxed in present estate" and "identified property previously taxed". It should be noted from Record page 40 that the jointly owned property is shown as included in Peter's *gross estate*, as stipulated, at \$577,971.92.

This, then, pinpoints the issue with respect to Factor 1—does the requirement in Section 812(c) that the deduction in the present decedent's estate (Thomas) for property previously taxed shall be the amount at which such identified property was included in the *gross estate* of the prior decedent (Peter), refer to the amount at which the property was included in Peter's gross estate (\$577,971.92), or does it refer to some "theoretical balance" which is in effect Peter's net estate less inheritance taxes and legacies (\$373,894.78), as claimed by the Government?

ISSUE WITH RESPECT TO FACTOR 2.

Line (a) of the schedule on page 63 of the Record shows as "Total of P.P.T. (property previously taxed) included in gross estate (of Thomas) \$444,126.52".

This was arrived at by deducting from the gross value of \$585,719.23 the property previously taxed, the federal estate tax liability on the estate of Peter of \$141,592.71 (R. 61).

This then pinpoints the issue with respect to Factor 2—should the property be included in the gross estate of Thomas at its fair market value of \$585,719.23, as contended by Appellant, or at such value of \$585,719.23 less the liability for estate tax of \$141,592.71 against Peter's estate, as contended by the Government?

DISTRICT COURT'S CONCLUSION.

The District Court, without discussion of particular factors, used the \$373,894.78 as the limitation on the initial identifiable value of the property previously taxed on the findings that

“The net value of the said jointly-owned property to which Thomas McDonough succeeded by virtue of the death of Peter McDonough was \$373,910.01, computed by deducting from the gross estate of Peter P. McDonough the specific legacies, the federal estate taxes, the state inheritance taxes and the deductions in the amounts set forth above.” (R. 76.)

and

“This left a net adjusted value of the interest of Thomas McDonough in the jointly-owned property included in the prior estate and included in Thomas McDonough's estate to which interest

Thomas McDonough succeeded on Peter P. McDonough's death of \$373,894.78." (R. 77.)

Neither the Government's theory of a "theoretical balance" nor the District Court's conclusion as to the "net adjusted value", are even mentioned in Section 812(c) as factors or tests for the determination of the deduction for property previously taxed, so the District Court's decision based on these particular findings has no support from the Statute and is in fact in direct conflict with the requirements of the Statute as to the factors which must be used in determining the property previously taxed deduction.

The District Court did make findings as to the Section 812(c) factors—that is, that the identified property was included in the gross estate of the prior decedent at a value of \$577,971.92 (R. 76) (Factor 1), and that the fair market value (which Appellant contends means the "gross estate" value) of the identified property in the estate of Thomas was \$585,719.23 (\$444,033.18 plus \$141,686.05—R. 77 and 78) (Factor 2), so, on the basis of these findings the Court should have concluded that the deduction for property previously taxed, under Section 812(c), before adjustments required by the fourth paragraph of Section 812(c), was \$577,971.92, the lesser of the two factors.

**ARGUMENT IN REPLY TO APPELLEE'S CONTENTION
AS SET FORTH IN ITS BRIEF.**

Appellant strongly urged that Section 812(c) clearly describes the factors to be used and the method

of their application so there is no occasion or legal authority for digression into far-off fields of theory to support a course of action in direct conflict with the clear wording of the statute.

The Government's entire argument is really set forth in footnote 3 on page 8 of its brief to the effect that Thomas did not inherit the full value of the joint property acquired upon Peter's death, but inherited only the net equity after reducing the full value by the charges against the property, and therefore it is only the net equity which under Section 812(c) "can be identified as having been received by the decedent from * * * such prior decedent by gift, bequest, devise or inheritance".⁴

If that is what Congress intended would it not have been simple to have said that the property previously taxed should be the net equity acquired from the prior decedent? The constant repetition of the reference to "gross estate" must in itself be conclusive in establishing that Congress intended by *unmistakable* terms, to set out exactly how this deduction was to be computed and what factors were to be used. If the reference to "*gross estate*" is to be ignored then what will be done about the requirement in the first sentence of the fourth paragraph of Sec. 812(c) that "where a deduction was allowed of any mortgage or other lien in determining the * * * estate tax of the prior decedent, which was paid in whole or in part

⁴The inconsistency of Government's contention with its computations as to the previously taxed property included in Thomas' estate is pointed out in footnote 2 *supra*.

prior to the decedent's death, then *the deduction allowable under this subsection shall be reduced by the amount so paid*''? (Italics supplied.) If the "deduction allowable under this subsection" is only the net equity, then this particular provision has no purpose or function because the literal application of the sentence would require a second reduction for the amount of the mortgage and such a result makes no sense whatever. Obviously, that provision acknowledges that the initial identifiable value of the property is its gross estate value in the prior estate and since the mortgage had been allowed as a deduction it is necessary to reduce the initial identifiable value by the amount of the mortgage to prevent the allowance of a deduction for property previously taxed greater than the net value at which the property was previously taxed in the prior estate.

Again, if the reference to "*gross estate*" throughout the Section is to be ignored, then what will be done about the requirement in the third sentence of the fourth paragraph of Section 812(c) that

"if the property includible in the gross estate to which the deduction is attributable is not wholly property subject to general claims—(1) before the application of the preceding sentence, the amount of the deduction under this subsection shall be reduced by that part of such amount as the value, at the time of decedent's death, of such property (to which such deduction is attributable) subject to claims but not to general claims is of the value, at the time of the decedent's death, of such property, and * * *

Obviously, since the only part of the property which would not be subject to general claims would be that part encumbered by liens or charges, the Statute acknowledges that the "deduction" before application of the above quoted sentence, could be the gross estate value before reduction for the amount of the liens or charges. The very purpose of this provision is to reduce the gross estate value of the property previously taxed by those charges or liens against the property (thus eliminating the possibility of a double deduction for the liens and charges which are separately allowed as deductions under Sec. 812(b)(4)), and because the "deduction" before application of this provision, may be a different amount than the amount at which the property is includible in the gross estate of the decedent,⁵ Congress evidently concluded that the use of the proportionate formula produced a fairer result than if the liens and charges were eliminated in full. Lines (g) and (h) in the schedule which is submitted in the Appendix hereto as Appellant's understanding of how the property previously taxed reduction should be determined, illustrates how this formula reduction is computed. If as the Government contends, the "property includible in the gross estate to which the deduction is attributable" was intended to refer merely to the net equity (the gross estate value of the property less the liens and charges), then

⁵This is true in this case where the identifiable gross estate value of the property in Thomas' estate was \$585,719.23 whereas the identifiable gross estate value of the property in Peter's estate was \$577,971.92 so the "deduction" before application of this sentence was \$577,971.92 the lesser of the two valuations.

this particular provision would have no purpose or function.

The adoption of the Government's contention would require a complete disregard of the use in the Statute, Section 812(c), of the term "includible in the gross estate" and of the term "gross estate", and also complete disregard of the fourth paragraph of Section 812(c). One of the earliest accepted rules of statutory construction is that when the words of a statute are plain and unambiguous, there is no room for construction and nothing is left for the Court but to give them their full effect. (*The Samuel E. Spring* (1886), 27 Fed. 764.) In *Gould v. Gould* (1915), 245 U.S. 151, the U. S. Supreme Court admonished that "in the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matter not specifically pointed out". (Also *Commissioner v. Van Vorst*, (C.A. 9, 1932), 59 F.2d 677.)

The exhibit in the Appendix hereto shows exactly how Section 812(c) is self operating to produce fair results through the adjustments provided for in the fourth paragraph thereof. There is no need to resort to theoretical assumptions as to what should be done under Section 812(c)—if the wording of the Section is given its clear meaning, and if it is applied in compliance with that meaning, the answer must be a fair determination of the property previously taxed deduction as Congress intended it.

The language of the Statute calls for the use of the value at which the particular property was included in the "gross estate". This does not mean some "theoretical balance" or "net equity". There is no mystery or ambiguity over the term "gross estate". The stipulation and the findings of the District Court show the values at which the property was included in the "gross estate"—\$577,971.92 in the gross estate of Peter McDonough, and \$585,719.23 in the gross estate of Thomas (assuming Appellant is correct that the lien is not to be applied as a reduction of the fair market value at which the property must be included in the "gross estate", but should be reported as a "deduction" from the gross estate in arriving at the net taxable estate as argued in Appellant's opening brief pages 17 to 19). These then are the amounts which should be recognized as the initial identifiable valuations of the property previously taxed to be used in the determination of the property previously taxed deduction.

CONCLUSION.

It is respectfully urged that this Honorable Court should (1) insist upon strict application of the wording of Section 812(c), and (2) rule that the basic valuations to be used in computing the property previously taxed deduction should be the valuations at which such property was included in the gross estate of the decedents,—\$577,971.92 as the value included in the gross estate of Peter McDonough, and \$585,719.23 as the value includible in the gross estate of

Thomas McDonough—and (3) reverse the decision of the District Court and remand the case to said Court for a determination of the proper estate tax in accordance with the reversal and for computation of the necessary adjustments required by the fourth paragraph of Section 812(c) for the determination of the property previously taxed deduction.

Dated, San Francisco, California,
February 28, 1956.

Respectfully submitted,

J. W. RADIL,

F. J. KILMARTIN,

KNIGHT, BOLAND AND RIORDAN,

Attorneys for Appellant.

GEORGE H. KOSTER,
Of Counsel.

(Appendix Follows.)

Appendix.



Appendix

ESTATE OF THOMAS McDONOUGH.

COMPUTATION OF DEDUCTION FOR PROPERTY PREVIOUSLY TAXED.

(a) Total of PPT included in Thomas gross estate Sch. 1 total of applicable cols. A or C Tr. par. 5, p. 24	\$ 585,719.23 <hr/> <hr/>
(b) Gross PPT deduction (Total of Col. C or Total of Col. E whichever is lower) (E—Finally determined value in previous estate—Tr. par. 4(b), p. 23)	\$ 577,971.92
(c) Less amount paid prior to decedent's death on mortgages or liens <i>deducted</i> in prior estate as gift	None <hr/>
(d) "Amount otherwise deductible" for PPT without proportionate deduction (b minus c)	\$ 577,971.92
(e) Liens on PPT: Mortgages, real estate taxes or collateral loans Fed. Est. Tax on Peter's estate paid by Thomas' estate (Tr. par. 4(e) and (f), p. 24)	None \$141,592.71 <hr/>
(f) Total of liens on PPT	\$ 141,592.71 <hr/> <hr/>
(g) First proportionate limitation: (f) $\frac{\$141,592.71}{\$585,719.23}$ X (d) \$577,971.92 =	(g) \$ 139,695.59 <hr/> <hr/>
(h) "Amount otherwise deductible" after first limitation (d minus g)	\$ 438,276.33 <hr/>
(i) Total of PPT included in gross estate (Same as (a))	\$ 585,719.23

(j) Reduce PPT to amount available for payment of general claims by deducting Mortgages, liens, real estate taxes and exempt assets		None
Fed. Est. Tax on Peter's estate paid by Thomas' estate	\$141,592.71	
Total	\$141,592.71	\$ 141,592.71
(k) PPT available for payment of general claims (i minus j)		\$ 444,126.52
(m) Proportion to determine "amount otherwise deductible" for purposes of computing the further reduction:		
(k) $\frac{\$444,126.52}{\$585,719.23}$	X (d) \$577,971.92 =	(m) \$ 438,217.61
(i) $\frac{\$444,126.52}{\$585,719.23}$		
(n) Value of gross taxable estate (\$1,074,213.54)	
	(plus \$141,592.71)	\$1,215,806.25
(o) Items not available for payment of general claims Assets not subject to general claims— Fed. Est. Tax on Peter's estate paid by Thomas' estate		\$ 141,592.71
(p) Gross estate subject to payment of claims (n minus o)		\$1,074,213.54

FOR BASIC TAX

(q) Total deduction from gross estate, including specific exemption and excluding PPT		\$308,628.37
Less: Fed. Est. Tax on Peter's est. paid by Thomas' Est.	\$141,592.71	(r) \$167,035.66
"Amount otherwise deductible" after first limitation (same as h)		(h) \$438,276.33
(s) Second proportionate limitation:		
(m) \$ 438,217.61	X (r) \$167,035.66 =	(s) \$ 68,133.58
(p) \$1,074,213.54		
(t) Net deduction for PPT—basic tax (h minus s)		\$370,142.75

FOR ADDITIONAL TAX

(u) Total deductions from gross tax- able estate, excluding PPT	\$268,628.37	
Less: Fed. Est. Tax on Peter's est. paid by Thomas' Est.	\$141,592.71	(v) \$127,035.66
	<hr/>	
"Amount otherwise deductible"		
after first limitation (same as h)		(h) \$438,276.33
(w) Second proportionate limitation:		
(m) \$ 438,217.61	X (v) \$127,035.66 =	(w) \$ 51,817.98
(p) \$1,074,213.54		
(x) Net deduction for PPT—Additional tax		
(u minus w)		\$386,458.35

Deduction allowed by Government and approved by District Court:

For basic tax	\$315,755.73
For additional tax	\$329,678.28

No. 14879

United States
Court of Appeals
For the Ninth Circuit.

BANK OF AMERICA NATIONAL TRUST AND
SAVINGS ASSOCIATION, as Executor for
the Last Will and Testament of Thomas Mc-
Donough, Deceased,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

FILED

JAN - 3 1956

Phillips & Ven Orden Co., 870 Brannan Street, San Francisco, Calif.-12-9-55

PAUL P. GIBLIN, CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the District Court of the United States in and
for the Northern District of California, South-
ern Division

No. 32762

BANK OF AMERICA NATIONAL TRUST AND
SAVINGS ASSOCIATION, a National Bank-
ing Corporation, as Executor of the Last Will
and Testament of THOMAS McDONOUGH,
Deceased,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT TO RECOVER FEDERAL
ESTATE TAXES

Comes now plaintiff above named and complains
of defendant above named and as and for a cause
of action against said defendant alleges as follows:

1. This civil action arises under Acts of Congress
providing for internal revenue, to wit: Internal
Revenue Code Act of February 10, 1939, C. 2, 53
Stat. 1 as amended, Sections 800 to 937 (Sections
800 to 937, Chap. 3, Estate Tax of Subtitle A, Title
26 U.S.C.A.) and I.R.C. 3772. Jurisdiction herein
is conferred by Section 1346 of Title 28, U.S.C.A.

2. At all times herein mentioned plaintiff, Bank
of America National Trust and Savings Association,
was and now is a national banking corporation or-

ganized under the laws and statutes of the United States, to wit, under Chapter 2 of Title 12, U.S.C.A.

3. Thomas McDonough died in San Francisco, California, on September 13, 1948, leaving a last Will and Testament wherein plaintiff was named executor thereof. On October 15, 1948, plaintiff was duly appointed executor of said Last Will and Testament by order of the Superior Court of the State of California in and for the City and County of San Francisco, qualified as such, and ever since has been and now is the duly appointed, qualified and acting executor of said Last Will and Testament, and brings this action in its said representative capacity.

4. On November 21, 1949, plaintiff executed and filed with the Collector of Internal Revenue, First District of California, at San Francisco, California, Form 706 Treasury Department, United States Estate Tax Return for the estate of said decedent and at that time paid to said Collector of Internal Revenue James G. Smyth the sum of \$160,651.22, being the full amount of tax shown in said return.

5. On October 29, 1951, the Commissioner of Internal Revenue, acting by and through the Acting Internal Revenue Agent in Charge, mailed to plaintiff his determination of estate tax liability in said estate determining a gross deficiency in Federal Estate Tax in the sum of \$26,173.64 and a net deficiency of \$8,516.75 after credit for California Inheritance Taxes paid by plaintiff. On January 5, 1952, plaintiff paid to the then Acting Collector of

Internal Revenue at San Francisco, California, Charles F. Masarik, Jr., said sum of \$8,516.75 plus interest thereon amounting to the sum of \$1,054.20.

6. Neither said James G. Smythe nor said Charles F. Masarik, Jr., is now in office as Collector or Director of Internal Revenue at San Francisco, California.

7. On April 21, 1952, plaintiff filed with the Collector of Internal Revenue at San Francisco, California, on Form 843 its claim for refund of the Federal Estate Taxes paid as aforesaid in the sum of \$57,191.48, a true and correct copy whereof is attached hereto, made a part hereof, and marked "Exhibit A." On March 3, 1953, plaintiff was advised by the Director of Internal Revenue at San Francisco, California, that no grounds for reduction in tax liability in the above estate had been disclosed by said claim for refund.

8. Peter P. McDonough died in San Francisco, California, on July 8, 1947. At the time of his death he and said Thomas McDonough held and owned certain property as joint tenants with the right of survivorship and upon the death of said Peter P. McDonough said property passed by operation of the laws of the State of California to Thomas McDonough, who thereupon became the sole owner thereof; and such jointly-owned property at no time formed any part of the estate of said Peter P. McDonough under the laws of the State of California or any other laws. By virtue of I.R.C. 811 the gross estate of said Peter P. McDonough subject to Fed-

eral Estate Tax included one-half of the said property so held in joint tenancy and plaintiff, as administrator of said Estate of Peter P. McDonough, filed the Federal Estate Tax Return (Form 706) of said estate and included therein in "Schedule E" a detailed itemized list of such jointly-owned property and included as a part of the gross estate subject to Federal Estate Tax one-half of the value thereof amounting to the sum of \$607,014.10. Upon final audit dated May 25, 1951, by the Commissioner of Internal Revenue acting by and through his duly authorized agents, the value of the one-half interest in said jointly-owned property was finally determined at the sum of \$577,971.92, and plaintiff, as administrator of the Estate of Peter P. McDonough, acquiesced in and accepted such valuation.

9. According to said final audit in the Estate of Peter P. McDonough the net estate subject to Federal Estate Tax other than said jointly-owned property belonging to said Thomas McDonough amounted to only the sum of \$33,608.21 and said sum was utterly inadequate to pay the total Federal Estate Tax in said estate which was finally determined at the sum of \$149,289.84. The said Federal Estate Tax upon the Estate of Peter P. McDonough became a lien upon the undivided one-half interest of Peter P. McDonough in said jointly-owned property at the time of his death. On September 13, 1948, the said Thomas McDonough died leaving intact and without diminution all of the said jointly-

owned property which had become solely vested in him upon the death of said Peter P. McDonough and leaving unpaid his obligation to pay to the administrator of the Estate of Peter P. McDonough his share of said Federal Estate Tax, which said obligation was imposed upon him by Section 975 of the Probate Code of California. It, therefore, became necessary for plaintiff, as executor of the Estate of Thomas McDonough, Deceased, to pay the amount of the Federal Estate Tax due in the Estate of Peter P. McDonough upon said jointly-owned property, and plaintiff did pay on October 8, 1948, to said Collector out of the assets of said Estate of Thomas McDonough other than the said jointly-owned property, the sum of \$141,686.05 for and on account of the obligation so owed to the administrator of said Estate of Peter P. McDonough. Subsequently and upon said final audit by the Commissioner of Internal Revenue under date of October 29, 1951, of the Estate of Thomas McDonough it was finally determined that the amount of such Federal Estate Tax in the Estate of Peter P. McDonough for and on account of said property which became solely vested in Thomas McDonough upon the death of said Peter P. McDonough was \$141,592.71.

10. By the final audit of the Commissioner of Internal Revenue in the Estate of Thomas McDonough dated October 29, 1951, said Commissioner finally determined that the value of the property of Peter P. McDonough upon which the Federal Estate Tax in the latter's estate had been paid and

which was included and identified in the gross estate of said Thomas McDonough at the date of his death as having been received by him from said Peter P. McDonough was the sum of \$585,719.23, and plaintiff acquiesced and does now acquiesce in such determination.

11. Section 811 of the Internal Revenue Code required that there be included in the gross estate of Thomas McDonough all of his property, including the undivided one-half interest amounting to \$585,719.23 of jointly-owned property received by said Thomas McDonough upon the death of Peter P. McDonough. In the return Form 706 filed by plaintiff with the Collector as stated in paragraph 4 above, plaintiff set forth in Schedule A (Real Estate), Schedule B (Stocks and Bonds) and Schedule C (Mortgages, Notes and Cash) only one-half of the total values of the property formerly owned by Thomas McDonough and Peter P. McDonough and set forth the other one-half in Schedule I (Property Previously Taxed). Believing that it was so required to do, plaintiff erroneously deducted from the valuation of \$585,719.23 hereinabove mentioned as the final amount of such previously taxed property the amount of the Federal Estate Tax which it was obligated to pay to the administrator of the Estate of Peter P. McDonough, which, as stated above, was finally determined at \$141,686.05; that said amount of \$141,686.05 constituted a debt and liability of the Estate of Thomas McDonough and an indebtedness in respect to his said property un-

der Section 812, I.R.C., and should have been deducted from the gross estate; that with said addition the gross estate under I.R.C. 811 of said Thomas McDonough amounted to \$1,215,806.25 instead of \$1,074,213.54 as shown in the final determination of October 29, 1951; that in preparing the claim for refund "Exhibit A" plaintiff erroneously used said figure of \$1,074,213.54 in its computations instead of said \$1,215,806.25 and by reason thereof the computations used in said "Exhibit A" must be changed in accordance therewith.

12. By virtue of Section 812 (c) of the Internal Revenue Code (Title 26, U.S.C.A., Par. 812 (c)) it is provided that the value of the net estate of Thomas McDonough subject to Federal Estate Tax shall be determined by deducting from the value of his gross estate an amount equal to the value of any property forming a part of the gross estate for Federal Estate Tax purposes of Peter P. McDonough to the extent of the value of such property identified as having been received by Thomas McDonough from said Peter P. McDonough and included in the gross estate of said Thomas McDonough, which said amount as hereinbefore related amounted to the sum of \$585,719.23; that the only reduction of said \$585,719.23 provided by said Section 812 (c) applicable thereto is a reduction by an amount which bears the same ratio to deductions from the gross estate of Thomas McDonough allowed by Subsections (a), (b), and (d) of said Section 812, to wit:

(a) an exemption of \$100,000.00;

(b)

(1) for funeral expenses;

(2) for administration expenses;

(3) for claims against the estate; and

(4) for unpaid indebtedness in respect to property where decedent's interest therein is included undiminished in his gross estate; and

(d) charitable bequests;

as said \$585,719.23 bears to all the property of said Thomas McDonough subject to general claims; that the respective amounts of said deductions are as follows:

(a) An exemption of	\$100,000.00
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(b)

(1) Funeral expenses	1,652.83
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(2) Administration expenses:

Attorneys' fees	\$ 58,317.68
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Executor's commissions	33,317.68
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Caretaker's expense	2,307.59
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Appraisal fees	844.27
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Insurance	133.43
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Miscellaneous	713.74
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Sub-Total	\$ 95,634.39
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Less claimed on estate 1949 In

come Tax Return	54,613.13	41,021.26
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(3) Claims against the estate includ-

ing \$141,592.71 due Adminis-

trator of Estate of Peter P.

McDonough	160,954.28
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(d) Charitable bequests	5,000.00
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Total	\$308,628.37
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that the total of all the property of said Thomas McDonough subject to general claims was and is the sum of \$1,215,806.25; that the ratio by which the said reduction is to be determined is
$$\frac{585,719.23}{1,215,806.25}$$

which is to be applied against said deductions of \$308,628.37, resulting in a reduction from said \$585,719.23 of \$148,682.64 for the basic tax; that the foregoing deductions applicable to the additional tax amount to \$268,628.37 using an exemption of \$60,000.00 instead of \$100,000.00 and the corresponding reduction of said \$585,719.23 amounts to \$129,412.52.

13. A Federal Estate Tax was paid to the United States upon property in the Estate of Peter P. McDonough determined as aforesaid at the amount of \$585,719.23 and not upon any lesser amount, and since Thomas McDonough died within five years of the death of said Peter P. McDonough, the said sum of \$585,719.23 may not be taxed again in the Estate of Thomas McDonough under the Internal Revenue Code nor under any other law; that pursuant to said Section 812 the only reduction of said sum permitted is the sum of \$148,682.64 for the basic tax and the sum of \$129,412.52 for the additional tax leaving a net deduction for property previously taxed of \$437,036.59 for the basic tax and \$456,306.71 for the additional tax; that all regulations of the Commissioner of Internal Revenue contrary to the above are null and void and violate the terms of the Internal Revenue Code and specifically Section 812 thereof; that attached hereto

and marked "Exhibit B" is a schedule showing the computations of the basic and additional estate taxes in said estate.

14. By reason of the action of said Commissioner in reducing said above sums of \$437,036.59 and \$456,306.71 constituting the value of the property previously taxed in the Estate of Peter P. McDonough, said Commissioner has unlawfully and illegally increased the Federal Estate Tax in the Estate of Thomas McDonough by the sum of \$40,249.05 as shown in "Exhibit B" attached hereto, and plaintiff is entitled to recover said sum paid by it as aforesaid together with interest thereon.

Wherefore, plaintiff prays that judgment be rendered in its favor for the said sum of \$40,249.05 with interest thereon at six per centum per annum from time of payment.

/s/ J. W. RADIL,

/s/ F. J. KILMARTIN,

KNIGHT, BOLAND &
RIORDAN,

Attorneys for Plaintiff.

EXHIBIT A

Treasury Department Form 843.

Claim

To Be Filed With the Collector Where Assessment
Was Made or Tax Paid

The Collector will indicate in the block below the
kind of claim filed, and fill in the certificate on
the reverse side.

- ☒ Refund of Tax Illegally Collected.
- ☐ Refund of Amount Paid for Stamps Un-
used, or Used in Error or Excess.
- ☐ Abatement of Tax Assessed (not applicable
to estate or income taxes).

State of California,
City and County of San Francisco—ss.

Collector's Stamp (Date received): [Blank].

Name of taxpayer or purchaser of stamps: Estate of
Thomas McDonough, Bank of America, Execu-
tor.

Business address: 300 Montgomery St., San Fran-
cisco 20, California.

Residence

The deponent, being duly sworn according to law,
deposes and says that this statement is made on
behalf of the taxpayer named, and that the facts
given below are true and complete:

1. District in which return (if any) was filed:
1st California.

3. Character of assessment or tax: Federal Estate Tax.

4. Amount of assessment, \$170,222.17; dates of payment, Nov. 21, 1947, and Jan. 5, 1952.

* * *

6. Amount to be refunded: \$57,191.48.

* * *

8. The time within which this claim may be legally filed expires, under Section 910 Tit. 26, USCA, on Nov. 20, 1952, and Jan. 4, 1955.

The deponent verily believes that this claim should be allowed for the following reasons:

See statement attached.

The above executor filed the return and is still acting as such.

Bank of America N.T. & S.A., as Executor of the Last Will and Testament of Thomas McDonough, Deceased.

By J. A. CURTIS,

Assistant Trust Officer.

Sworn to and subscribed before me this 15th day of April, 1952.

[Seal] /s/ EDMUND LEE KELLY,
Notary Public.

My Commission Expires Jan. 23, 1956.

In this statement the letters PPT mean "property previously taxed."

The purpose of Sec. 812 (c) TiT. 26 USCA is to prevent the transfer of the same property from being taxed twice within five years.

The value of the property in joint tenancy of Peter F. McDonough and Thomas McDonough upon which a Federal Estate Tax was paid in the Estate of Peter F. McDonough (who died July 8, 1947) and which was specifically identified in Estate of Thomas McDonough (who died Sept. 13, 1948) per Form 706 in Estate of Thomas McDonough and per audit and determination of Oct. 29, 1951 (IT:EG:23853 First Calif.) was \$ 585,719.23

The law (Sec. 812 (c) TiT. 26 USCA) does not provide that this previously taxed property shall be reduced by the amount of the Federal Estate taxes assessed and paid in the proceedings in the Estate of Peter F. McDonough upon this \$585,719.23 which amounted to \$141,592.71. Nor does the law provide that to determine the value of this previously taxed property mathematical gymnastics shall be applied to the actual physical property so identified so as to reduce it to a "theoretical balance", thus frittering away and destroying the deduction provided by Congress. Hence there is no legal basis for reducing this \$585,719.23 actually on hand in the Estate of Thomas McDonough and so identified to \$373,894.73. All regulations of the Commissioner contrary to the above are in excess of his authority and void. The only reduction in the value of the PPT permitted by Sec. 812 (c) is one due to the fact that this PPT in the present estate (Thomas McDonough) is subject to its proportion of the specific exemption, funeral expenses, administration expenses and claims in the present estate which in the case of the basic tax amount to \$167,035.66, namely:

	<u>585,719.23</u>	X 167,035.66	equals	\$ 91,076.86
leaving a net deduction for PPT for basic tax of	<u>1,074,213.54</u>			\$ 494,642.37

	<u>585,719.23</u>	X 127,035.66	equals	\$ 69,266.70
leaving a net deduction for PPT for additional tax of	<u>1,074,213.54</u>			\$ 516,452.53

COMPUTATION OF NET ESTATE FOR BASIC TAX

Gross Estate		\$1,074,213.54
Total of funeral and administration expense, debts, and charitable bequests per audit	\$ 67,035.66	
Specific exemption	100,000.00	
Deduction for PPT as above	<u>494,642.37</u>	
Total deductions		<u>661,673.03</u>
Net Estate for basic tax		<u><u>\$ 412,535.51</u></u>

Computation of Net Estate for Additional Tax

Gross Estate	\$ 1,074,213.54
Total of funeral and administration expense, debts, and charitable be- quests per audit	\$ 67,035.66
Specific exemption	60,000.00
Deduction for PPT as above	516,452.53
<hr/>	
Total deductions	643,488.19
<hr/>	
Net Estate for additional tax	\$ 430,725.35
<hr/>	
Gross basic tax on \$412,535.51	\$ 13,126.78
Credit for California Inheritance Tax (30%)	10,501.42
<hr/>	
Gross basic tax less credit for Inheri- tance Tax	\$ 2,625.36
<hr/>	
Total gross taxes on \$430,725.35	\$123,532.11
Gross basic tax	13,126.78
<hr/>	
Gross additional tax	\$110,405.33
Net basic tax	2,625.36
<hr/>	
Total tax payable	\$113,030.69
<hr/>	
Amount paid with return on Nov. 21, 1949	\$160,651.22
Amount of deficiency per audit Oct. 29, 1951 paid on Jan. 5, 1952	8,516.75
Interest on deficiency paid on Jan. 5, 1952	1,054.20
<hr/>	
	\$170,222.17
Less total tax payable as above	113,030.69
<hr/>	
Amount to be refunded	\$ 57,191.48
<hr/>	

EXHIBIT B

Computation of Basic and Additional Estate Taxes

Basic Tax

Gross Estate		\$ 1,215,806.25
Less: Exemption of \$100,000.00 funeral expenses, administration expenses and claims, including indebtedness due to Estate of Peter P. McDonough and chari- table bequests per paragraph 12 supra	\$308,628.37	
Property previously taxed	437,036.59	745,664.96
Net estate subject to basic tax		<u>\$ 470,141.29</u>
Gross basic tax on \$470,141.29	\$ 16,007.06	
Less credit for California Inheri- tance Tax (80%)	12,805.65	
Net basic tax	\$ 3,201.41	

Additional Tax

Gross Estate		\$ 1,215,806.25
Less: Exemption of \$60,000.00 funeral expenses, administration expenses and claims, including indebtedness due to Estate of Peter P. McDonough and chari- table bequests per paragraph 12 supra	\$268,628.37	
Property previously taxed	456,306.71	724,935.03
Net estate subject to additional tax		<u>\$ 490,871.17</u>
Tentative tax	\$142,778.77	
Less gross basic tax	16,007.06	
Net additional tax		\$ 126,771.71
Add net basic tax (supra)		<u>3,201.41</u>
Total Federal Estate Tax		<u>\$ 129,973.12</u>

Total Federal Estate Tax actually	
paid	\$169,167.97
Interest paid on alleged deficiency of	
\$8,516.75	1,054.20
	<hr/>
Total amount paid	\$170,222.17
Less Federal Estate Tax computed	
above	129,973.12
	<hr/>
Amount of refund due	\$ 40,249.05

Duly verified.

[Endorsed]: Filed May 8, 1953.

[Title of District Court and Cause.]

ANSWER

Comes now the defendant by its attorney, Lloyd H. Burke, United States Attorney in and for the Northern District of California, and for its answer to the complaint filed in the above-entitled action alleges as follows:

1. The defendant admits the allegations of paragraph 1 of the complaint.
2. The defendant admits the allegations of paragraph 2 of the complaint.
3. The defendant admits the allegations of paragraph 3 of the complaint.
4. The defendant admits the allegations of paragraph 4 of the complaint.
5. The defendant admits the allegations of paragraph 5 of the complaint, except that it denies that

payment to the then Acting Collector of Internal Revenue at San Francisco, California, was made on January 5, 1952. The defendant alleges said payment was made on January 3, 1952.

6. The defendant admits the allegations of paragraph 6 of the complaint.

7. The defendant admits that on April 21, 1952, plaintiff filed with the then Collector of Internal Revenue at San Francisco, California, a claim for refund (Form 843) of Federal Estate Taxes in the sum of \$57,191.48, and that "Exhibit A" attached to the complaint is a full, true and correct copy of that claim as filed. The defendant further admits that plaintiff was, on March 3, 1953, advised by the Director of Internal Revenue at San Francisco, California, that no grounds for the reduction of tax liability were disclosed by said claim for refund. The defendant denies the truth or correctness of the allegations contained in said "Exhibit A."

8. The defendant is without knowledge or information sufficient to form a belief as to the truth or correctness of the allegations contained in paragraph 8 of the complaint.

9. The defendant is without knowledge or information sufficient to form a belief as to the truth or correctness of the allegations contained in paragraph 9 of the complaint.

10. The defendant is without knowledge or information sufficient to form a belief as to the truth or correctness of the allegations contained in paragraph 10 of the complaint.

11. The defendant is without knowledge or information sufficient to form a belief as to the truth or correctness of the allegations contained in paragraph 11 of the complaint.

12. The defendant is without knowledge or information sufficient to form a belief as to the truth or correctness of the allegations contained in paragraph 12 of the complaint.

13. The defendant is without knowledge or information sufficient to form a belief as to the truth or correctness of the allegations contained in paragraph 13 of the complaint.

14. The defendant denies the allegations contained in paragraph 14 of the complaint.

Wherefore, it is prayed that judgment be entered in favor of the defendant, and that it be granted its costs and all other just and proper relief.

/s/ LLOYD H. BURKE,

United States Attorney.

[Endorsed]: Filed September 10, 1953.

[Title of District Court and Cause.]

PRE-TRIAL ORDER

Pursuant to the order for pre-trial proceedings made and entered herein on November 1, 1954, a pre-trial conference was held before the Honorable Oliver J. Carter on November 10, 1954. There appeared at the conference J. W. Radil, Esq., of Messrs. Knight, Boland & Riordan, attorneys for plaintiff, and Lloyd H. Burke, Esq., United States

Attorney, by George A. Blackstone, Esq., Assistant United States Attorney, attorneys for defendant. Pursuant to Rule 16 of the Federal Rules of Civil Procedure and the consent of the aforesaid counsel, It Is Hereby Ordered:

1. The correct date of payment by plaintiff of the deficiency in tax in the Estate of Thomas McDonough as related in paragraph 5 of the Complaint on file herein is January 3, 1952.

2. The allegations of paragraph 8 of the Complaint on file herein are true and correct.

3. Attached hereto and numbered for identification are the following documents:

Ex. 1. Certain pages of the Estate Tax Return, Form 706, in the Estate of Peter F. McDonough filed with the then Collector of Internal Revenue at San Francisco, California.

Ex. 2. Final audit dated May 25, 1951, made by the Commissioner of Internal Revenue of the said return, Ex. 1.

Ex. 3. Certain pages of the Estate Tax Return, Form 706, in the Estate of Thomas McDonough filed with the then Collector of Internal Revenue at San Francisco, California.

Ex. 4. Final audit dated October 29, 1951, made by the Commissioner of Internal Revenue of the said return, Ex. 2.

All of the four aforesaid documents are true and correct copies of the original documents and said copies are hereby admitted into evidence without

further authentication at the trial of this cause. All of the figures stated in said documents are correct with the exception that the parties to not agree upon the method used in marshalling and computing the gross and net estate of Thomas McDonough and the amount of the deductions to be allowed from said gross estate in respect to the property previously taxed in the Estate of Peter F. McDonough under section 812 (c), I.R.C., nor do they agree upon the amount of the tax liability in said Estate of Thomas McDonough.

4. Referring to the allegations in paragraph 9 of the Complaint on file herein, the following facts are admitted:

(a) The gross estate of Peter F. McDonough as shown on Ex. 2 was \$638,673.66.

(b) The jointly-owned property of Peter F. McDonough and Thomas McDonough as shown on the final audit in the Estate of Peter F. McDonough, Ex. 2, was \$577,971.92.

(c) The allowable amount of deductions from the gross estate of Peter F. McDonough as shown on the said final audit in said Ex. 2 was \$27,093.53.

(d) The total Federal Estate Tax determined in the Estate of Peter F. McDonough as shown upon said final audit, Ex. 2, was \$149,289.84.

(e) Bank of America, as Executor of the Estate of Thomas McDonough, paid to the Collector of Internal Revenue at San Francisco, California,

on October 8, 1948, \$141,686.05 for and on account of the Federal Estate Taxes in the Estate of Peter F. McDonough attributable to said jointly-owned property.

(f) By the final audit in the Estate of Thomas F. McDonough, Ex. 4, dated October 29, 1951, it was finally determined that the amount of Federal Estate Tax in the Estate of Peter F. McDonough attributable to said jointly-owned property was the sum of \$141,592.71.

5. Referring to the allegations of paragraph 10 of said Complaint, the gross value of the property jointly owned by Peter F. McDonough and Thomas McDonough included and identified in the Estate of Thomas McDonough at the date of his death as having been received by him from the said Peter F. McDonough without taking account of the proportionate amount of the Federal Estate Tax in the Estate of Peter F. McDonough attributable to said jointly-owned property was the sum of \$585,-719.23.

6. In the event plaintiff should prevail in this action, the exact amount of the judgment is to be computed by mutual agreement, or in the absence of such agreement, by the Court on the basis of the evidence then and there to be submitted.

Dated: November 10, 1954.

/s/ OLIVER J. CARTER,

Judge of the United States
District Court.

UNITED STATES

ESTATE TAX RETURN

(To be executed and filed in duplicate)

Exemptions of nonresidents not citizens of the United States may generally
file on Form 706-A instead of this form. For details see back of sheet XX.

PETER P. MC DONOUGH

Decedent's name July 8, 1947

Date of death 2090 Broadway, Apt. 706, San Francisco

Residence (domicile) at time of death United States of America

Citizenship (nationality) at time of death

(Space for use of collector)

RECEIVED

Tax of \$141,626.05

pd on 10/8/48

directly by Bank to

Collector of Internal Revenue

for City of San Francisco

GENERAL INSTRUCTIONS

STATUTE AND GENERAL DESCRIPTION

The Federal estate tax is neither a property nor an inheritance tax. It is imposed upon the transfer of the entire net estate and not upon any particular legacy, devise, or distributive share. The relationship of the beneficiary to the decedent has no bearing on the question of liability or the extent thereof.

Federal estate taxation (chapter 3 of the Internal Revenue Code) consists of the basic estate tax (subchapter A) and the additional estate tax (subchapter B).

In the case of a citizen or resident of the United States, a specific exemption of \$100,000 is authorized for the purpose of the basic estate tax, and a specific exemption of \$60,000 is authorized for the purpose of the additional estate tax.

A credit is authorized against the basic estate tax (not in excess of 80 percent thereof) for estate, inheritance, legacy, or succession taxes paid a State, Territory, the District of Columbia, or any possession of the United States. No such credit is allowable against the additional estate tax.

Credits for Federal gift taxes are, under certain conditions, allowable against both the basic and the additional estate taxes.

In the case of a citizen or resident of the United States, credit is authorized by treaties, under certain conditions, for Dominion succession duties imposed in Canada, estate duty imposed in Great Britain, and estate duty imposed in Northern Ireland. (See "Credits under Death Duty Conventions" on the back of sheet 11.)

Different provisions control the determination of the tax liability of the estates of citizens or residents of the United States and the estates of nonresidents not citizens of the United States. (References herein to the deceased person's residence mean the deceased person's domicile.) For specific information on Federal estate taxation in the case of a nonresident not a citizen of the United States, see the "Additional Instructions for Estates of Nonresidents not Citizens of the United States" on the back of sheet XX.

ESTATES FOR WHICH RETURN REQUIRED

A return on this form must be filed for the estate of every citizen or resident of the United States whose gross estate as defined by the statute exceeded \$60,000 in value at the date of death. (See "Estates of Persons Dying before October 22, 1942" on the back of sheet 11 for information on the requirement of a return in the case of a resident or citizen dying prior to that date.)

The value of the gross estate at the date of the decedent's death governs the liability for the filing of the return, regardless of any valuation as of a subsequent time that may be adopted by the executor under the provisions of section 811(c) of the Internal Revenue Code.

TIME AND PLACE FOR FILING RETURN

The return is due 15 months after the date of the decedent's death. The return for the estate of a resident decedent must be filed with the collector in whose district the decedent had his domicile at the time of death. The return for the estate of a nonresident citizen must be filed with the collector in whose district the gross estate in the United States was situated; or, if the gross estate in the United States was situated in more than one district or if no part of the gross estate was situated in the United States, it must be filed with the Collector for the Second District of New York or with such collector as the Commissioner may designate.

PAYMENT OF TAX

The tax is due 15 months after the date of the decedent's death, and must be paid within such period unless an extension of time for payment thereof has been granted by the Commissioner. Check or money order in payment of the tax should be made payable to "Collector of Internal Revenue at _____ naming city and State in which is located the office of the collector with whom the return is filed."

GROSS ESTATE

In addition to the general provision of the statute requiring the inclusion in the gross estate of property to the extent of the decedent's interest therein, other provisions specifically include, as more fully explained hereinafter in the instructions for the separate schedules, certain transfers made during the decedent's life without an adequate and full consideration in money or money's worth, joint estates with right of survivorship, tenancies by the entirety, community property, life insurance even though payable to beneficiaries other than the estate, property over which the decedent possessed a power of appointment, and dower or curtesy (or statutory estate in lieu thereof) of the surviving spouse.

SUPPLEMENTAL DOCUMENTS

If the decedent was a resident and died testate, two copies of the will, one of them certified, must be filed.

If the decedent was a nonresident citizen, the following documents must be filed with the return:

(1) A copy of the inventory of property and the schedule of liabilities, claims against the estate and expenses of administration filed with the foreign court of probate jurisdiction, certified by a proper official of such court.

(2) A copy of the return filed under the foreign inheritance, estate, legacy, succession tax, or other death duty act, certified by a proper official of the foreign tax department, if the estate is subject to such a foreign tax.

(3) If the decedent died testate, a certified copy of the will.

Other supplemental documents may be required as hereinafter explained under the instructions for the several schedules.

EXECUTION OF RETURN

This form consists of the cover sheets and 20 inside sheets numbered in consecutive order. A complete set should be used for every copy of the return required. For convenience in typing carbon copies, the sets as issued may be readily separated and the corresponding sheets matched. When completed, each copy of the return to be filed must be permanently fastened together with all sheets in proper order. Any suitable type of paper fastener may be used for this purpose. Ordinary wire staples are recommended for the return of average size. The return must be filed in duplicate. A separate printed, numbered 1 to XXII, must be included.

Write only on one side of each sheet of paper. If there is not sufficient space for an entry under any of the printed schedules, use additional sheets of the same size, and insert in the proper order in the return. All information required, as indicated under "General Information," must be supplied in the spaces provided. The

Schedule E

Jointly Owned Property

(1) Did the decedent, at the time of his death, own any property as a joint tenant or as a tenant by the entirety, with right of survivorship? Yes.

(2) If so, state the name and address of each surviving cotenant. Mr. Thomas McDonaugh, 1436-23rd Avenue, San Francisco, California.

Value at date of
death

Total (also enter under the Recapitulation,
Schedule O)\$607,014.10

Estate of Peter P. McDonough

Schedule E—Sheet VIII

SECURITIES HELD BY PETER P. McDONOUGH
AND THOMAS McDONOUGH AS JOINT TENANTS

<u>STOCKS</u>			Value as of <u>July 8, 1947</u>
<u>No. Shares</u>	<u>Security</u>		
1. 300	American Telephone and Telegraph Company Capital stock	\$ 31,875.00	
2. 7,500	Bank of America N. T. & S. A. Common stock	334,687.50	
3. 220	Barnedall Oil Company Common stock	6,256.25	600
4. 100	Consolidated Natural Gas Company Capital stock	4,768.75	500
5. 1,000	General Motors Corporation Common stock	60,125.00	✓
6. 1,000	General Public Utilities Corporation Common stock	14,562.50	✓
7. 5	Mission Corporation Common stock	194.37	500
8. 125	Middle States Petroleum Corporation Trust Certificate for Class "B" stock	609.37	500
9. 350	North American Oil Consolidated Capital stock	7,375.00	✓
10. 1,100	Pacific Gas and Electric Company Common stock	44,550.00	605
11. 1,000	Pacific Public Service Company Common stock	15,125.00	✓
12. 1,000	Pacific Public Service Company Common (Non- Voting) stock	15,125.00	
13. 300	Pacific Telephone and Telegraph Company Common stock	20,350.00	✓
14. 100	South Carolina Electric & Gas Company Common stock	700.00	✓
15. 1,000	Standard Oil Company of New Jersey Capital stock	77,187.50	✓
16. 2,500	Standard Oil Company of California Capital stock	153,750.00	✓
17. 384	Texas Public Service Company Common stock	8,256.00	✓
18. 20,000	Transamerica Corporation Capital stock	247,500.00	✓
19. 3,000	Union Oil Company of California Capital stock	67,500.00	✓
<u>BONDS</u>			
20. \$ 8,000	International Hydro-Electric System Convertible 6% Gold Debentures, dated April 1, 1929 due April 1, 1944	8,050.00	✓
21. 20,000	United States of America 2½% Treasury Bonds, dated September 15, 1943 due December 15, 1969/64	20,700.00	
22. 10,000	United States of America 2½% Treasury Bonds, dated February 1, 1944 due March 15, 1970/65	10,278.12	
23. 20,000	United States of America 2½% Treasury Bonds, dated November 15, 1945 due December 15, 1972/67	20,556.25	67,284
24. 10,000	The United States of America 2½% Treasury Bond dated October 20, 1941 due September 15, 1972/67	10,565.62	
25. 5,000	The United States of America 2½% Treasury Bond, dated December 1, 1944 due March 15, 1971/66	5,184.37	

REAL PROPERTY HELD BY PETER P. McDONOUGH
AND THOMAS McDONOUGH AS JOINT TENANTS

Improved Real Property located in the City and County of San Francisco, State of California, designated as follows:

26. PARCEL ONE:

1436 - 23rd Avenue, San Francisco, Lot No. 38, Assessor's Block 1831, Legal description as follows:

BEGINNING at a point on the easterly line of Twenty-third Avenue, distant thereon 200 feet southerly from the southerly line of Judah Street; running thence southerly along said line of Twenty-third Avenue 50 feet; thence at a right angle easterly 96 feet, more or less, to a line drawn southerly from a point on the southerly line of Judah Street, distant thereon 113 feet and 5 inches easterly from the easterly line of Twenty-third Avenue, to a point on the northerly line of Kirkham Street, distant thereon 70 feet and 6 inches easterly from the easterly line of Twenty-third Avenue; thence northeasterly along the line so drawn 50 feet, more or less, to a line drawn easterly from the point of beginning, at a right angle to the easterly line of Twenty-third Avenue; thence westerly along said last line so drawn 99 feet, more or less, to the point of beginning.

Being portion of OUTSIDE LAND BLOCK NO. 747.

\$15,000.00

27. PARCEL TWO:

1415-17th Avenue, San Francisco, Lot No. 4, Assessor's Block No. 1527, Legal description as follows:

BEGINNING at a point on the westerly line of Seventeenth Avenue, distant thereon 75 feet southerly from the point formed by the intersection of the westerly line of Seventeenth Avenue with the southerly line of Geary Boulevard; and running thence southerly along said line of Seventeenth Avenue 25 feet; thence at a right angle westerly 82 feet and 6 inches; thence at a right angle northerly 25 feet; and thence at a right angle easterly 82 feet and 6 inches to the point of beginning.

Being part of OUTSIDE LAND BLOCK NO. 267.

11,500.00

28. PARCEL THREE:

Unimproved real property located in Contra Costa County, State of California, Legal description as follows:

All that certain real property situated in the City of Richmond, County of Contra Costa, State of California, described as follows:

Lots 19, 20 and 21 in Block Q, as delineated upon that certain map entitled, "Map No. 3 of the Town of POINT RICHMOND," being a portion of lots 51 and 43 of the final partition of the San Pablo Rancho, Contra Costa County, California; filed September 12, 1900, in Book E of Maps, page 107, in the office of the County Recorder of the County of Contra Costa, State of California.

1,200.00

29. PARCEL FOUR:

Unimproved real property located in the City of Berkeley, County of

Alameda, State of California, Legal description as follows:

REAL PROPERTY in the City of Berkeley, County of Alameda, State of California, described as follows:

LOTS 156, 157 and 158, as said lots are shown on the "Map of North Terrace Tract, Alameda Co. Cal.", filed October 12, 1906 in book 20 of Maps, page 80 in the office of the County Recorder of Alameda County.

\$ 150.00

30.

Commercial Account

Bank of America National Trust and Savings Association,
Clay-Montgomery Branch, in name of Peter and Thomas
McDonough

46.66

Total

\$1,214,028.26

Deductions

Schedule J

Funeral and Administration Expenses

Item No.	Amount
1 Executors' commissions—amount estimated	\$ 2,500.00
2 Attorneys' fees—amount estimated	2,500.00
Funeral Expenses	
3 Carew and English Mortuary, Masonic and Golden Gate Avenues, San Francisco	1,179.10
4 Monsignor James P. Cantwell, St. Brigid's Church, Van Ness and Broadway, San Francisco	150.00
5 Rev. Alexander Cody, S.J., St. Ignatius Church, 2130 Fulton Street, San Francisco	100.00
6 The American Florist, 1217 Polk Street, San Francisco, California	157.85
Miscellaneous Administration Expenses	
1 San Francisco Art Gallery—Appraising household furnishings	25.00
2 Walter H. Levison—Appraising jewelry	45.00
3 Bekins Van and Storage Company—Packing and hauling decedent's furniture	192.68
4 F. M. McAuliffe, Appraiser—Fee for appraising probate estate and joint tenancy property	58.43
5 Title Insurance and Guaranty Company—Name Run Report San Francisco real property	5.00
6 Richmond Martinez Abstract and Title Company—Contra Costa County real property	5.00
7 Richmond Martinez Title Company—Richmond real property	15.00
8 California Pacific Title Insurance Company—San Francisco, City and County, real property	12.50
9 Estimated closing costs, Notary fees, etc.	100.00
Total (also enter under the Recapitulation, Schedule O)	
	\$ 7,045.56

Schedule K

Debts of Decedent

Item No.	Creditor and Nature of Claim	Amount
1	Dr. Olav Kaarboe, 909 Hyde Street, San Francisco, California	\$ 650.00
2	Dr. Arthur L. Bloomfield, M.D., Stanford University Hospital, San Francisco, California	750.00
3	Thomas McDonough, 1436-23rd Avenue, San Francisco, California, Payment of following debts incurred by decedent: Hospital bills during last illness (St. Francis Hospital)	\$1,653.40
	Services of nurse	1,165.00
	Office rent—two months	230.00
	Additional nursing service and rent of decedent's apartment	150.00
	Maid service—two months	250.00
	Mrs. Matthews—practical nurse	250.00
		<hr/> 3,698.40
4	Thomas Allee Corporation—closing bill account of decedent—890 Post Street, San Francisco	5.25
5	Borden's Dairy Delivery Company, 1325 Potrero Avenue, San Francisco, California—closing bill account of decedent	2.80
6	Collector of Internal Revenue—1st California—1944 Income Tax Deficiency—Interest to date of payment	208.03
7	Franchise Tax Commissioner—1947 State Income Tax	104.37
8	Sherwood and Lewis, 703 Market Street, services rendered in preparation of income tax returns	200.00
9	Lamaxsou French Laundry, 2671 Sutter Street, San Francisco, California—closing bill account of decedent	11.10
10	The White House—closing bill account of decedent	2.61
11	Pacific Gas and Electric Company—closing bill account of decedent93

12	Claim of Arthur Klang for services as attorney, bookkeeping service and office assistance— balance due—suit filed by creditor—answer filed by bank	6,400.00
13	Claim of Joseph A. Brown, attorney-at-law— services rendered (in dispute)	14,000.00
Total (also enter under the Recapitulation, Schedule O)		\$ 26,033.49

Estate of Peter P. McDonough

Schedule K—Sheet XIV

Schedule O
Recapitulation

Schedule	Gross Estate	Value Under Option	Value at Date of Death
A	Real estate		
B	Stocks and bonds		
C	Mortgages, notes, and cash		\$ 18,395.18
D	Insurance		300.00
E	Jointly owned property — \$1,214,- 028.20—1/2 contributed by dece- dent		607,014.10
F	Other miscellaneous property		8,292.50
G	Transfers during decedent's life		
H	Powers of appointment		
I	Property previously taxed		
Total Gross Estate			<u>\$634,001.78</u>

Schedule	Deductions	Amount
J	Funeral and administration expenses	\$ 7,045.56
K	Debts of decedent	26,033.49
L	Mortgages and liens	
M	Support of dependents	
	Item (a) Total of above deductions	\$ 33,079.05
	Item (b) Value of property subject to claims	26,787.68
	Allowable amount of above deductions (item (a) or item (b), whichever is the smaller.) (See note)	\$ 26,787.68
M	Net losses during administration	
N	Charitable, public, and similar gifts and bequests	\$ 26,787.68
	Total Allowable Deductions, except specific exemption and property previously taxed	

Note: If item (a) exceeds item (b) attach an additional sheet showing the computation of item (b).

SCHEDULE P. NET ESTATE FOR THE BASIC TAX—RESIDENT OR CITIZEN*Instructions.*—This schedule should be used only for the estate of a resident or citizen of the United States.

Total gross estate.....		\$ 634,001.78
Total allowable deductions, except specific exemption and property previously taxed.....	\$ 26,787.68	
Specific exemption.....	100,000.00	
Total deductions, except property previously taxed (item 2 plus item 3).....	\$ 126,787.68	
Deduction for property previously taxed without proportionate reduction (Schedule I, item (c)).....	\$	
Proportionate reduction (see instructions for Schedule I as to computation, subparagraph (3) under "Limitations").....	\$	
Net deduction for property previously taxed (item 5 minus item 6).....	\$	
Total deductions (item 4 plus item 7).....		126,787.68
Net estate (item 1 minus item 8).....		\$ 507,214.10

SCHEDULE Q. NET ESTATE FOR THE ADDITIONAL TAX—RESIDENT OR CITIZEN*Instructions.*—This schedule should be used only for the estate of a resident or citizen of the United States.

Total gross estate.....		\$ 634,001.78
Total allowable deductions, except specific exemption and property previously taxed.....	\$ 26,787.68	
Specific exemption.....	60,000.00	
Total deductions, except property previously taxed (item 2 plus item 3).....	\$ 86,787.68	
Deduction for property previously taxed without proportionate reduction (Schedule I, item (c)).....	\$	
Proportionate reduction (see instructions for Schedule I as to computation, subparagraph (3) under "Limitations").....	\$	
Net deduction for property previously taxed (item 5 minus item 6).....	\$	
Total deductions (item 4 plus item 7).....		86,787.68
Net estate (item 1 minus item 8).....		\$ 547,214.10

SCHEDULE R. NET ESTATE—NONRESIDENT NOT A CITIZEN OF THE UNITED STATES*Instructions.*—This schedule should be used only for the estate of a nonresident not a citizen of the United States. See instructions for "Deduction of administration expenses, claims, etc." and "Specific exemption" on the back of sheet XX. Use Form 708b (Schedule I) instead of Schedule R for computation of net estate in case of decedent who at the time of his death was domiciled in Canada and not a citizen of the United States.

Value of gross estate in the United States (Schedules A, B, C, D, E, F, G, H, and I).....	\$	\$
Value of gross estate outside the United States, not including real property (attach itemized schedule sheet showing values).....		
Value of total gross estate wherever situated (item 1 plus item 2).....	\$	
Gross deductions under Schedules J, K, L, and M.....		
Net deductions under Schedules J, K, L, and M (that proportion of item 4 that item 1 bears to item 3).....		
Charitable, public, and similar gifts and bequests (Schedule N).....		
Specific exemption.....	2,000.00	
Total deductions, except property previously taxed (item 5 plus items 6 and 7).....	\$	
Deduction for property previously taxed without proportionate reduction (Schedule I, item (c)).....	\$	
Proportionate reduction (see instructions for Schedule I as to computation, subparagraph (3) under "Limitations").....	\$	
Net deduction for property previously taxed (item 9 minus item 10).....	\$	
Total deductions (item 8 plus item 11).....		
Net estate (item 1 minus item 12).....		\$

Peter P. McDonough

ESTATE OF.....

10-10622-4

SCHEDULES P, Q, AND R—SHEET XIX

Computation of Tax

1.	Gross basic tax (Use column (1) of Table, Sheet XXII)	\$ 17,860.71	
2.	Credit for State inheritance, etc., taxes (not to exceed 80% of item 1)	14,288.57	
3.	Gross basic tax less credit for State inheritance, etc., taxes (item 1 minus item 2)		\$ 3,572.14
4.	Total gross taxes (basic and additional) (Tentative Tax) (Use column (2) of Table, Sheet XXII)	\$162,224.94	
5.	Gross basic tax	17,860.71	144,364.23
6.	Gross additional tax (item 4 minus item 5)		
7.	Total gross taxes less credit for State inheritance, etc., taxes (item 3 plus item 6)		\$147,936.37
8.	Credit for Federal gift taxes		
9.	Credit for foreign death duties		
10.	Total credit for Federal gift taxes and foreign death duties (item 8 plus item 9)		
11.	Net estate tax payable (item 7 minus item 10)		\$147,936.37

Estate of Peter P. McDonough Computation of Tax—Sheet XX

EXHIBIT 2

Treasury Department
Internal Revenue Service
San Francisco 5, Calif.

May 25, 1951.

Office of
Internal Revenue Agent in Charge
San Francisco Division
74 New Montgomery Street.

In Replying Refer to:

Estate of Peter P. McDonough.
Date of death: July 8, 1947.

Bank of America, NT & SA, Executors,
300 Montgomery Street,
San Francisco, California.

Gentlemen:

There is enclosed for your information and files a copy of a report covering the examination of the return, Form 706, of the above-named estate, recently made by a representative of this office. You have indicated your agreement to the adjustment of tax liability shown in the report.

The item checked below explains briefly how settlement of the agreed tax liability will be accomplished through the office of the Collector of Internal Revenue for your district.

Very truly yours,

/s/ F. M. HARLESS,

Internal Revenue Agent in
Charge.

ovh

Enclosure.

- ☒ **Deficiency:** The collector will present to you at an early date a bill for payment of the net deficiency in tax, together with interest, at which time remittance should be made to that official, provided you have not already paid the full amount due.
- ☐ **Overassessment:** After the overassessment has been certified to the collector by the Commissioner of Internal Revenue, the amount will be refunded or credited.

Preliminary Statement

Statement of Tax Liability

Estate Tax—Tax previously assessed per RAR\$148,643.33

Adjustments to This Report

Deficiency\$ 646.51

Correct tax liability\$149,289.84

The deficiency here results principally from a reduction in the amount of attorneys' fees and executors' commissions allowed previously on the basis of the amounts therefor actually expended.

Table of Contents

- Schedule 1. Line Adjustments.
Schedule 1-A. Explanation of changes in gross estate.
Schedule 1-B. Explanation of changes in deductions.
Schedule 2. Computation of tax.

ESTATE OF Peter P. McDonoughDATE OF DEATH July 8, 1947SCHEDULE 1

LINE ADJUSTMENTS—ESTATE TAX

	ADDITIONS TO VALUE OF ESTATE	DEDUCTIONS FROM VALUE OF ESTATE	CORRECTED
A. Real estate.....	\$ 0.00		\$ 0.00
B. Stocks and bonds.....	33,714.06		33,714.06
C. Mortgages, notes, and cash.....	18,395.18		18,395.18
D. Insurance.....	300.00		300.00
E. Jointly owned property.....	577,971.92		577,971.92
F. Other miscellaneous property.....	8,292.50		8,292.50
G. Transfers during decedent's life.....			
H. Powers of appointment.....			
I. Property previously taxed.....			
TOTAL GROSS ESTATE.....	\$638,673.66		\$638,673.66
J-1. Funeral and administration expenses.....	\$ 15,515.56	\$2,085.52	\$ 13,460.04
K-2. Debts of decedent.....	13,633.19		13,633.19
L-3. Mortgages and liens.....			
M-4. Support of dependents.....			
M-5. Net losses during administration.....			
6. Allowable amount of above deductions.....	\$ 29,179.05	\$2,085.52	\$ 27,093.53
M-1-7. Bequests, etc., to surviving spouse.....			
8. Adjusted gross estate.....			
9. Net amount deductible for bequests, etc., to surviving spouse (Item 7, or one-half of Item 8, whichever is smaller).....			
N-10. Charitable, etc., bequests.....			
TOTAL ALLOWABLE DEDUCTIONS (Items 6, 9, and 10).....	\$ 29,179.05	\$2,085.52	\$ 27,093.53
FOR BASIC TAX			
Specific exemption.....	\$100,000.00		\$100,000.00
Deduction for property previously taxed.....	0.00		0.00
TOTAL DEDUCTIONS.....	\$129,179.05	\$2,085.52	\$127,093.53
NET ESTATE.....	\$509,494.61	\$2,085.52	\$511,580.13
FOR ADDITIONAL TAX			
Specific exemption.....	\$ 60,000.00		\$ 60,000.00
Deduction for property previously taxed.....	0.00		0.00
TOTAL DEDUCTIONS.....	\$ 60,000.00	\$2,085.52	\$ 57,914.48
NET ESTATE.....	\$511,580.13	\$2,085.52	\$511,580.13

Schedule No. 1-B
Explanation of Changes in Deductions

	Per RAR	Corrected
Schedule J—Funeral and Administration Expenses		
Executors' Commissions	\$ 6,000.00	\$ 4,957.24
Attorneys' Fees	7,500.00	6,457.24
	<hr/>	<hr/>
Totals	\$13,500.00	\$11,414.48
		<hr/>
	11,414.48	
	<hr/>	
Decrease	\$ 2,085.52	
	<hr/>	

To adjust for amounts allowed for executors' commissions and attorneys' fees in RAR, and for such amounts actually paid.

ESTATE OF Peter P. McDonoughDATE OF DEATH July 8, 1947SCHEDULE 2

COMPUTATION OF ESTATE TAX

	PER STATE LAW	CORRECTED
Net estate (for basic tax).....	\$ 509,494.61	\$ 511,580.23
Net estate (for additional tax).....	509,494.61	551,580.23
1. Gross basic tax.....	17,974.73	18,079.01
2. Credit for State inheritance, etc., taxes.....	14,379.70	14,463.21
3. Gross basic tax, less credit for State inheritance, etc., taxes (item 1 minus item 2).....	\$ 3,594.95	\$ 3,615.80
4. Total gross taxes (basic and additional).....	163,023.21	163,753.05
5. Gross basic tax.....	17,974.73	18,079.01
6. Gross additional tax (item 4 minus item 5).....	145,048.38	145,674.04
7. Total gross taxes, less credit for State inheritance, etc., taxes (item 3 plus item 6).....	148,643.33	149,289.84
8. Credit for Federal gift taxes.....	0.00	0.00
9. Credit for foreign death duties.....	0.00	0.00
10. Total credit for Federal gift taxes and foreign death duties (item 8 plus item 9).....	0.00	0.00
11. Net estate tax payable (item 7 minus item 10).....	148,643.33	149,289.84
		148,643.33
Deficiency/overpayment.....		\$ 646.51

Form 706
Estate Tax Return
(Revised July 1947)

UNITED STATES

ESTATE TAX RETURN

(To be executed and filed in duplicate)

Return of nonresident not citizens of the United States may generally be on Form 706A instead of this form. For details see back of sheet XX.

Decedent's name THOMAS M. BOSCHDate of death SEPTEMBER 12, 1948Residence (domicile) at time of death SAN FRANCISCO, CALIFORNIA.Citizenship (nationality) at time of death U.S.A.

GENERAL INSTRUCTIONS

STATUTE AND GENERAL DESCRIPTION

The Federal estate tax is neither a property nor an inheritance tax. It is imposed upon the transfer of the entire net estate and not upon any particular legacy, devise, or distributive share. The relationship of the beneficiary to the decedent has no bearing on the question of liability or the extent thereof.

Federal estate taxation (chapter 3 of the Internal Revenue Code) consists of the basic estate tax (subchapter A) and the additional estate tax (subchapter B).

In the case of a citizen or resident of the United States, a specific exemption of \$100,000 is authorized for the purpose of the basic estate tax, and a specific exemption of \$40,000 is authorized for the purpose of the additional estate tax.

A credit is authorized against the basic estate tax (not in excess of 80 percent thereof) for estate, inheritance, legacy, or succession taxes paid a State, Territory, the District of Columbia, or any possession of the United States. No such credit is allowable against the additional estate tax.

Credits for Federal gift taxes are, under certain conditions, allowable against both the basic and the additional estate taxes.

In the case of a citizen or resident of the United States, credit is authorized by treaties, under certain conditions, for Dominion succession duties imposed in Canada, estate duty imposed in Great Britain, and estate duty imposed in Northern Ireland. (See "Credits under Death Duty Conventions" on the back of sheet II.)

Different provisions control the determination of the tax liability of estates of citizens or residents of the United States and the estates of nonresidents not citizens of the United States. (References herein to the deceased person's residence mean the deceased person's domicile.) For specific information on Federal estate taxation in the case of a nonresident not a citizen of the United States, see the "Additional Instructions for Estates of Nonresidents not Citizens of the United States" on the back of sheet XX.

ESTATES FOR WHICH RETURN REQUIRED

A return on this form must be filed for the estate of every citizen or resident of the United States whose gross estate as defined by the statute exceeded \$40,000 in value at the date of death. (See "Estates of Persons Dying before October 22, 1942" on the back of sheet II for information on the requirement of a return in the case of a resident or the gross estate at the date of the decedent's death.)

The value of the gross estate at the date of the decedent's death governs the liability for the filing of the return, regardless of any situation as of a subsequent time that may be adopted by the executor under the provisions of section 811 (j) of the Internal Revenue Code.

TIME AND PLACE FOR FILING RETURN

The return is due 15 months after the date of the decedent's death. The return for the estate of a resident decedent must be filed with the collector in whose district the decedent had his domicile at the time of death. The return for the estate of a nonresident decedent must be filed with the collector in whose district the gross estate in the United States was situated; or, if the gross estate in the United States was situated in more than one district, or if no part of the gross estate was situated in the United States, it must be filed with the Collector for the Second District of New York, or with such collector as the Commissioner may designate.

PAYMENT OF TAX

The tax is due 15 months after the date of the decedent's death, and must be paid within such period unless an extension of time for payment thereof has been granted by the Commissioner. Check or money order in payment of the tax should be made payable to "Collector of Internal Revenue at _____" naming city and State in which is located the office of the collector with whom the return is filed.

GROSS ESTATE

In addition to the general provision of the statute requiring the inclusion in the gross estate of property to the extent of the decedent's interest therein, other provisions specifically include, as more fully explained hereinafter in the instructions for the separate schedules, certain transfers made during the decedent's life without an adequate and full consideration in money or money's worth, joint estates with right of survivorship, tenancies by the entirety, community property, life insurance even though payable to beneficiaries other than the estate, property over which the decedent possessed a power of appointment, and dower or curtesy (or statutory estate in lieu thereof) of the surviving spouse.

SUPPLEMENTAL DOCUMENTS

If the decedent was a resident and died testate, two copies of the will, one of them certified, must be filed.

If the decedent was a nonresident citizen, the following documents must be filed with the return:

(1) A copy of the inventory of property and the schedule of liabilities, claims against the estate and expenses of administration filed with the foreign court of probate jurisdiction, certified by a proper official of such court.

(2) A copy of the return filed under the foreign inheritance, estate, legacy, succession tax, or other death duty act, certified by a proper official of the foreign tax department, if the estate is subject to such a foreign tax.

(3) If the decedent died testate, a certified copy of the will.

Other supplemental documents may be required as hereinafter explained under the instructions for the several schedules.

EXECUTION OF RETURN

This form consists of the cover sheets and 30 inside sheets numbered in consecutive order. A complete set should be used for every copy of the return required. For convenience in typing carbon copies, the sets as issued may be readily separated and the corresponding sheets matched. When completed, each copy of the return to be filed must be permanently fastened together with all sheets in proper order. Any suitable type of paper fastener may be utilized for this purpose. Ordinary wire staples are recommended for the return of average size. The return must be filed in duplicate. All sheets provided, numbered 1 to XXII, must be included.

Write only on one side of each sheet of paper. If there is not sufficient space for all entries under any of the printed schedules, use additional sheets of the same size, and insert in the proper order in the return. All information required, as indicated under "General Information," must be supplied in the spaces provided. The

(over)

10-70606-7 SEED 1

EXHIBIT 3



Gross Estate

Schedule A

Real Estate

Did the decedent, at the time of his death, own any real estate in the United States? Yes.

Item No.	Value at Date of Death
----------	---------------------------

Parcel I

1. $\frac{1}{2}$ of all that certain real property situate, lying and being in the city and county of San Francisco, State of California, described as follows, to wit: Beginning at a point on the easterly line of Twenty-third Ave., distant thereon 200 feet southerly from the southerly line of Judah St.; running thence southerly along said line of Twenty-third Ave. 50 feet; thence at a right angle easterly 96 ft., more or less, to a line drawn southerly from a point on the southerly line of Judah St., distant thereon 113 ft., and 5 inches, easterly from the easterly line of Twenty-third Ave., to a point on the northerly line of Kirkham St., distant thereon 70 ft. and 6 inches easterly from the easterly line of Twenty-third Ave.; thence northeasterly along the line so drawn 50 ft., more or less, to a line drawn easterly from the point of beginning, at a right angle to the easterly line of Twenty-third Ave.; thence westerly along said last line so drawn 99 ft., more or less, to the point of beginning. Being portion of Outside Land Block No. 747. (See Schedule I)\$7,500.00

Parcel II

2. $\frac{1}{2}$ of all that certain real property situate, lying and being in the City and County of San Francisco, State of California, described as follows, to wit: Beginning at a point on the westerly line of Seventeenth Ave., distant thereon 75 ft., southerly from the point formed by the intersection of the westerly line of Seventeenth Ave., with the southerly line of Geary Blvd.; and running thence southerly along said line

of Seventeenth Ave., 25 ft.; thence at a right angle westerly 82 ft., and 6 inches; thence at a right angle northerly 25 ft.; and thence at a right angle easterly 82 ft. and 6 inches to the point of beginning. Being part of Outside Land Bloek No. 267. (See Schedule I) 5,750.00

Parcel III

3. $\frac{1}{2}$ of all that certain real property situated in the City of Richmond, County of Contra Costa, State of California, described as follows: Lots 19, 20 and 21 in Bloek "Q" as delineated upon that certain map entitled, "Map No. 3 of the Town of Point Richmond" being a portion of lots 51 and 43 of the final partition of the San Pablo Rancho, Contra Costa County, California, filed Sept. 12, 1900, in Map Book "E," page 107, in the office of the County Recorder of the County of Contra Costa, State of California 600.00

Parcel IV

4. $\frac{1}{2}$ of all that certain real property situate, lying and being in the City of Berkeley, County of Alameda, State of California, described as follows: Lots 156, 157 and 158, as said lots are shown on the "Map of North Terrace Tract, Alameda County, California," filed Oct. 12, 1906, in book 20 of Maps, page 80, in the office of the County Recorder of Alameda County 225.00

SCHEDULE I

PROPERTY PREVIOUSLY TAXED

(See instructions on reverse of preceding sheet and this sheet)

JULY 8, 1947

Name of donor or prior decedent PETER P. MC DONOUGH If a decedent, show date of death _____
 If a donor, show date of gift _____ Residence of donor at time of gift, or of prior decedent at time of death _____

Item No.	Description of property, subsequent valuation dates, and description and amounts of mortgages or other liens paid	(Column A) Value under option	(Column B) Income under apportion	(Column C) Value at date of death	(Column D) Income accrued at date of death	(Column E) Finally determined value as of date of gift
1	Item (b) below represents pro rate payment of Federal Estate tax due in Estate of Peter Mc Donough by Estate of Thomas Mc Donough	\$	\$	\$	\$	\$
TOTALS		\$	\$	\$ 442,408.18	\$ 1,625.00	\$ 432,682.59

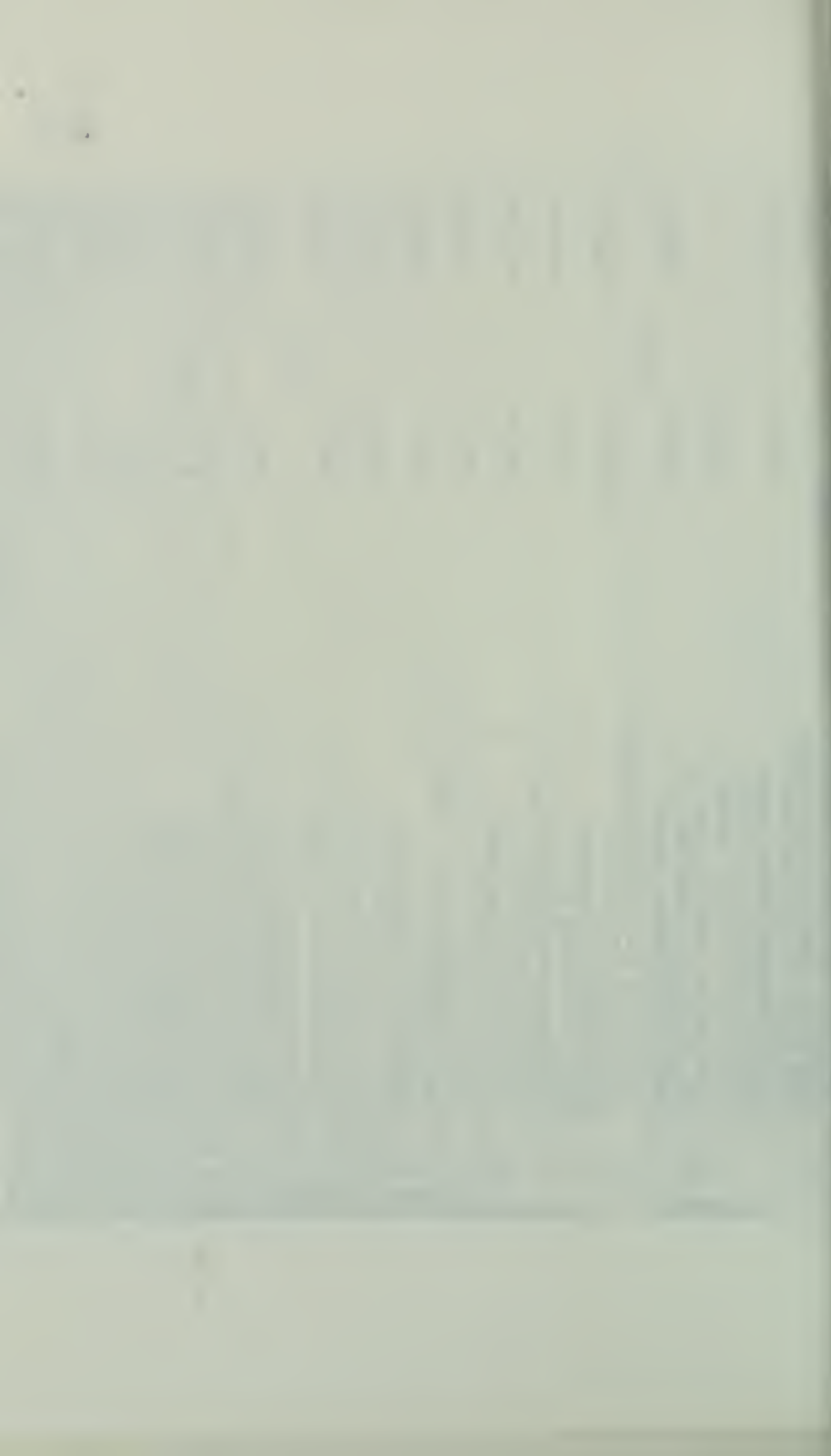
Total included in gross estate (total of columns A and B, or total of columns C and D, whichever is applicable) (also enter under Reconciliation, Schedule O) - \$ 444,033.18
 (e) Gross deduction (total of applicable column A or C, or total of column E, whichever is lower) - \$ 432,682.59
 (b) Total amount paid on mortgages or other liens deducted in prior estate or gift (enter detailed information at bottom of column headed "Description") - \$ 0-
 (c) Deduction for property previously taxed without proportionate reduction (item (e) minus item (b)) (also enter under Schedules P and Q, or Schedule E) - \$ 13,350.59

(If more space is needed, insert additional sheets of same size)

ESTATE OF THOMAS MC DONOUGH



1.	\$4,000.00 P.V. International Hydro-Electric System 6% Deb. due 4-1-44 (See Schedule B)	2,675.00	4,025.00
	1/2 of 30% liquidating dividend on 8000 International Hydro-Electric System 6% Conv.Gold Deb.due 4-1-44 (See Schedule C)	1,200.00	
2.	100 Shs.Amer.Tel. & Tel. Co. capital stk. \$100. P.V. New York Corp.(See Schedule B) Quarterly dividend declared 8-18-43	15,187.50	15,937.50
		225.00	
3.	3750 Shs.Bank of America N.Y. & S.A.,Common Stk.\$12.50 P.V. (See Schedule B)	168,750.00	167,343.75
4.	500 Shs.Gen.Motors Corp.Common Stk. \$10. P.V. (See Schedule B)	31,158.75	30,062.50
5.	500 Shs.Gen.Public Utilities Corp.Common Stk.\$5. \$V. (See Schedule B)	6,437.50	7,281.25
6.	125 Shs.Worth Amer.Oil Consolidated, Common Stk. (See Schedule B)	7,187.50	3,687.50
7.	605 Shs.Pacific Gas & Electric Co.Common Stock, (See Schedule B)	20,645.62	22,275.00
8.	1000 Shs.Pacific Public Service Co. Common Stock, (See Schedule B)	17,500.00	15,125.00
9.	100 Shs.Pacific Tel. & Tel. Co.Common (See Schedule B) Quarterly dividend declared 9-2-49	9,525.00	10,175.00
	50 Shs.South Carolina Electric & Gas Co. Common Stock (See Schedule B)		350.00
11.	1250 Shs.Standard Oil Co.of Calif.Common Stock (See Schedule B) Quarterly dividend declared 7-29-48	76,437.50	76,875.00
12.	512-1/2 Shs.Standard Oil Co. of New Jersey, Common Stk. (See Schedule B)	1,250.00	
13.	211 Shs. Texas Public Service Co. Common Stk. (See Schedule B)	38,309.38	38,593.75
14.	10,000 Shs.Transamerica Corp. Common (See Schedule B)	5,143.13	4,128.00
		111,875.00	123,750.00



15.	1500 Shs. Union Oil Co. of California. Common Stock (See Schedule B)	148,093.75	33,750.00
16.	Parcel I, 1/2 of Improved Real Property 1136 23rd Ave., San Francisco, Calif. (See Schedule A)	7,500.00	7,500.00
17.	Parcel II, 1/2 of Improved Real Property 115 17th Ave., San Francisco, Calif. (See Schedule A)	5,750.00	5,750.00
18.	Parcel III, 1/2 of Unimproved Real Property Lots 19, 20, & 21 Block Q Point Richmond Contra Costa Co. Calif. (See Schedule A)	600.00	600.00
19.	Parcel IV, 1/2 of Unimproved Real Property Lots 156, 157 & 158 Berkeley, Alameda County, Calif. (See Schedule A)	225.00	225.00
20.	CASH (SEE RECOMMENDATION ITEM 1 SCHEDULE C) 1/2 proceeds of Sale of following: 5 Shs. Mission Corporation Common 220 Shs. Barnsdall Oil Co. Common 100 Shs. Consolidated Natural Gas Co. Common 125 Shs. Middle States Petroleum Corp. Class B. Stock	133.24 4,565.29 2,368.65 148.39 7,151.11	97.19 3,120.13 2,384.58 304.69
TOTALS: Federal Estate Tax paid by this decendant on estate received from prior decendant		584,094.23 141,686.05 825,780.28	1,625.00 — 81,625.00
			573,348.64 141,686.05 81,625.00

Deductions

Schedule J

Funeral and Administration Expenses

* * *

Funeral Expenses

	Amount
Carew & English Inc., 350 Masonic Ave., San Francisco, Calif., Funeral of Decedent	\$1,252.03
Rev. Alexander Cook, S.J., 2130 Fulton St., San Francisco, Calif., Funeral Mass of Decedent	150.00
St. Brigid's Church Broadway & Van Ness Ave., San Francisco, Calif., Funeral Services for Decedent	100.00
L. Bocci & Sons, Colma, Calif., Inscription on Decedent's Tomb	37.50
Castro Flower Shop, 489 Castro St., San Francisco, Calif., Floral Blanket for Casket of Decedent	113.30
<hr/>	
Total (also enter under the Recapitulation, Schedule O)	\$1,652.83

Estate of Thomas McDonough

Schedule J—Sheet XIII

Schedule K

Debts of Decedent

Item No.	Creditor and Nature of Claim	Amount
1.	Flora Riedel, nursing services 9/2/48 to 9/17/48 ..\$	75.00
2.	Helen Conklin, 795 Geary St., San Francisco, Calif., nursing services, rendered decedent	12.35
3.	F. J. Kilmartin, 125 Moncada Way, San Francisco, Calif., reimbursement for amount paid Rein Moh for nursing services on 9/13/48	12.00
4.	Dorothy Nesman, 2872 Washington St., San Francisco, Calif., nursing services 9/11/48 to 9/12/48	22.00
5.	Native Sons Florist, Colma, San Mateo Co., Calif., charges for flowers for graves of Mr. and Mrs. Peter McDonough	14.35

Schedule O
Recapitulation

Schedule	Gross Estate	Value Under Option	Value at Date of Death
A	Real estate		\$ 14,075.00
B	Stocks and bonds		580,420.26
C	Mortgages, notes, and cash		29,040.66
D	Insurance		
E	Jointly owned property		
F	Other miscellaneous property ..		6,551.20
G	Transfers during decedent's life		
H	Powers of appointment		
I	Property previously taxed		444,033.18
	Total Gross Estate		<u>\$ 1,074,120.20</u>

Schedule	Deductions	Amount
J	Funeral and administration expenses	\$ 1,652.83
K	Debts of decedent	19,361.57
L	Mortgages and liens	
M	Support of dependents	
	Item (a) Total of above deductions	\$ 21,014.40
	Item (b) Value of property subject to claims	<u>1,074,120.20</u>
	Allowable amount of above deductions (item (a) or item (b), whichever is the smaller)	\$ 21,014.40
M	Net losses during administration	
N	Charitable, public, and similar gifts and bequests	5,000.00
	Total Allowable Deductions, except specific exemption and property previously taxed	<u>\$ 26,014.40</u>

SCHEDULE P. NET ESTATE FOR THE BASIC TAX—RESIDENT OR CITIZEN*Instructions.*—This schedule should be used only for the estate of a resident or citizen of the United States.

Total gross estate.....		\$ 1,074,120.20
Total allowable deductions, except specific exemption and property previously taxed.....	\$ 26,014.40	
Specific exemption.....	100,000.00	
Total deductions, except property previously taxed (item 2 plus item 3).....	\$ 126,014.40	
Deduction for property previously taxed without proportionate reduction (Schedule I, item (c)).....	\$ 432,682.69	
Proportionate reduction (see instructions for Schedule I as to computation, subparagraph (3) under "Limitations").....	\$ 50,997.78	
Net deduction for property previously taxed (item 5 minus item 6).....	\$ 381,684.81	
Total deductions (item 4 plus item 7).....		\$ 507,709.21
Net estate (item 1 minus item 8).....		\$ 566,410.99

SCHEDULE Q. NET ESTATE FOR THE ADDITIONAL TAX—RESIDENT OR CITIZEN*Instructions.*—This schedule should be used only for the estate of a resident or citizen of the United States.

Total gross estate.....		\$ 1,074,120.20
Total allowable deductions, except specific exemption and property previously taxed.....	\$ 26,014.40	
Specific exemption.....	60,000.00	
Total deductions, except property previously taxed (item 2 plus item 3).....	\$ 86,014.40	
Deduction for property previously taxed without proportionate reduction (Schedule I, item (c)).....	\$ 432,682.69	
Proportionate reduction (see instructions for Schedule I as to computation, subparagraph (3) under "Limitations").....	\$ 34,894.31	
Net deduction for property previously taxed (item 5 minus item 6).....	\$ 397,798.28	
Total deductions (item 4 plus item 7).....		\$ 483,812.68
Net estate (item 1 minus item 8).....		\$ 590,307.52

SCHEDULE R. NET ESTATE—NONRESIDENT NOT A CITIZEN OF THE UNITED STATES*Instructions.*—This schedule should be used only for the estate of a nonresident not a citizen of the United States. See instructions under "Deduction of administration expenses, claims, etc." and "Specific exemption" on the back of sheet XX. Use Form 708b (Schedule (I)) instead of Schedule R for computation of net estate in case of decedent who at the time of his death was domiciled in Canada and not a citizen of the United States.

Value of gross estate in the United States (Schedules A, B, C, D, E, F, G, H, and I).....	\$.....	\$.....
Value of gross estate outside the United States, not including real property (attach itemized schedule sheet showing values).....	\$.....	
Value of total gross estate wherever situated (item 1 plus item 2).....	\$.....	
Gross deductions under Schedules J, K, L, and M.....		
Net deductions under Schedules J, K, L, and M (that proportion of item 4 that item 1 bears to item 3).....		
Charitable, public, and similar gifts and bequests (Schedule N).....		
Specific exemption.....	2,000.00	
Total deductions, except property previously taxed (item 5 plus items 6 and 7).....	\$.....	
Deduction for property previously taxed without proportionate reduction (Schedule I, item (c)).....	\$.....	
Proportionate reduction (see instructions for Schedule I as to computation, subparagraph (3) under "Limitations").....	\$.....	
Net deduction for property previously taxed (item 9 minus item 10).....	\$.....	
Total deductions (item 8 plus item 11).....		
Net estate (item 1 minus item 12).....		\$.....

ESTATE OF THOMAS MC DONOUGH

16-10428-4

SCHEDULES P, Q, AND R—SHEET XIX

Computation of Tax

1. Gross basic tax (Use column (1) of Table, Sheet XXII)	\$ 20,820.51
2. Credit for State inheritance, etc., taxes (not to exceed 80% of item 1)	16,656.41
3. Gross basic tax less credit for State inheritance, etc., taxes (item 1 minus item 2)	\$ 4,164.10
4. Total gross taxes (basic and addi- tional) (Tentative Tax) (Use col- umn (2) of Table, Sheet XXII) ..	\$177,307.63
5. Gross basic tax	20,820.51
6. Gross additional tax (item 4 minus item 5)	156,487.12
7. Total gross taxes less credit for State inheritance, etc., taxes (item 3 plus item 6)	\$160,651.22
8. Credit for Federal gift taxes	
9. Credit for foreign death duties	
10. Total credit for Federal gift taxes and foreign death duties (item 8 plus item 9)	
11. Net estate tax payable (item 7 minus item 10)	\$160,651.22

EXHIBIT 4

Treasury Department

Internal Revenue Service
74 New Montgomery Street
San Francisco 5, California

Oct. 29, 1951.

Office of

Internal Revenue Agent in Charge
San Francisco Division
IRA:EG:90-D:IB

IT:EG:23853—First California
Estate of Thomas McDonough.
Date of death: September 13, 1948.

Estate of Thomas McDonough
Bank of America, National Trust
and Savings Association, Executors
P. O. Box 3415 Rincon Annex
San Francisco 20, California.

Gentlemen:

You are advised that the determination of the estate tax liability of the above-named estate, discloses a deficiency of \$26,173.64, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the

90th day) from the date of the mailing of this letter, you may file a petition with The Tax Court of the United States, at its principal address, Washington 25, D. C., for a redetermination of the deficiency or deficiencies.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, San Francisco 5, California, for the attention of Conference Section. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Very truly yours,

JOHN B. DUNLAP,
Commissioner;

By /s/ R. L. SUTHERLAND,
Acting Internal Revenue
Agent in Charge.

Enclosures:

Statement

Form 890

Form 1276

Exhibit A.

Statement

San Francisco

IRA:EG:90-D:IB

Estate of Thomas McDonough
 Bank of America, National Trust
 and Savings Association, Executors
 P. O. Box 3415 Rineon Annex
 San Francisco 20, California

IT:EG:23853—First California

Estate of Thomas McDonough

Date of death: September 13, 1948

	Liability	Assessed	Deficiency
Estate tax	\$186,824.86	\$160,651.22	\$ 26,173.64

In making this determination of the Federal estate tax liability of the above-named estate, it is noted that you did not avail yourself of the privilege of filing a protest.

Adjustments to Net Estate

	For Basic Tax	For Additional Tax
Net estate as disclosed by the return ..	\$566,410.99	\$590,307.52
Additions in value of net estate and decreases in deductions:		
(a) Property previously taxed, Schedule I	93.34	93.34
(b) Deduction for property previously taxed	65,939.08	68,120.00
	<hr/> \$632,443.41	<hr/> \$658,520.86
Increases in deductions:		
(c) Funeral and administra- tion expenses, Schedule J	41,021.26	41,021.26
Net estate as adjusted	<hr/> \$591,422.15	<hr/> \$617,499.60

Explanation of Adjustments

	Returned	Determined
(a) Property previously taxed Sched- ule I	\$144,033.18	\$444,126.52
Increase	\$ 93.34	

The increase shown above is com-
puted as follows:

Column A	\$584,094.23	\$584,094.23
Column D	1,625.00	1,625.00
	<hr/>	<hr/>
	\$585,719.23	\$585,719.23
Less: Federal estate tax	141,686.05	141,592.71
	<hr/>	<hr/>
Total	\$444,033.18	\$444,126.52
Increase		\$ 93.34

(b) Deduction for property previ- ously taxed: for basic tax	\$381,694.81	\$315,755.73
Decrease		\$ 65,939.08
for additional tax	\$397,798.28	\$329,678.28
Decrease		\$ 68,120.00

The amount determined above as the deduction for property
previously taxed is as shown on Exhibit "A" attached.

(c) Funeral and administration ex- penses, Schedule J	\$ 1,652.83	\$ 42,674.09
Increase		\$ 41,021.26

An additional deduction for funeral and administration ex-
penses is allowed as follows:

Total attorneys' fees	\$ 58,317.68
Executors' commissions	33,317.68
Caretaker's expense	2,307.59
Appraisal fees	844.27
Insurance	133.43
Miscellaneous administration ex- penses	713.74
	<hr/>
Total	\$ 95,634.39
Deduct what was claimed on the estate 1949 Income Tax return..	54,613.13
	<hr/>
Balance allowed	\$ 41,021.26

Computation of Estate Tax

	Returned	Determined
Gross estate for basic tax	\$ 1,074,120.20	\$ 1,074,213.54
Deductions	507,709.21	482,791.39
Net estate for basic tax	\$ 566,410.99	\$ 591,422.15
Gross estate for additional tax	\$ 1,074,120.20	\$ 1,074,213.54
Deductions	483,812.68	456,713.94
Net estate for additional tax	\$ 590,307.52	\$ 617,499.60
Gross basic tax	\$ 22,071.11	
Credit for State inheritance, etc. taxes	0.00	\$ 22,071.11
Total gross taxes (basic and addi- tional)	\$ 186,824.86	
Gross basic tax	22,071.11	164,753.75
Total tax payable		\$ 186,824.86
Estate tax assessed, November, 1949, list, Page 8, Line 1, First Califor- nia District		160,651.22
Deficiency in estate tax		\$ 26,173.64

Upon receipt of a waiver or upon expiration of 90 days from the date of this letter, if a petition is not filed with the Tax Court of the United States, the deficiency of \$26,173.64 will be assessed. In the event that evidence of the payment of State, estate, inheritance, legacy or succession taxes, as required by Section 81.9 of Regulations 105 is filed within the 90-day period, the net deficiency of \$8,516.75 will be assessed.

(ET-SF-42

EXHIBIT "A"

Estate of : Thomas McDonoughDate of death: September 13, 1948EXPLANATION OF CHANGES IN DEDUCTION FOR PROPERTY PREVIOUSLY TAXED

- (a) Total of P.P.T. included in gross estate (Schedule I, total of applicable columns A or C) \$444,126.52
- (b) Gross P.P.T. deduction (Total of applicable columns A or C, or total of E, whichever is lower) 373,894.78 *
- (c) Less amount paid prior to decedent's death on mortgages or liens deducted in prior estate or gift _____
- (d) "Amount otherwise deductible" for P.P.T. without proportionate deduction (b. Minus c) 373,894.78
- (e) Liens on P.P.T.:
- | | |
|-------------------|-------|
| Mortgages | _____ |
| Real estate taxes | _____ |
| Collateral loans | _____ |
| | _____ |
- (f) Total of liens on P.P.T. _____
- (g) First proportionate limitation:
- (f) 0 x (d) 373,894.78 = (g) 0
- (a) 444,126.52
- (h) "Amount otherwise deductible" after first limitation (d minus g) 373,894.78
- (i) Total of P.P.T. included in gross estate (same as a) 444,126.52
- (j) Reduce P.P.T. to amount available for payment of general claims by deducting:
- | | |
|------------------------------|-------|
| Mortgages and liens | _____ |
| Real estate taxes | _____ |
| Assets exempt from creditors | _____ |
| | _____ |
- Total of items listed under (j) (j) _____
- (k) P.P.T. available for payment of general claims (i minus j) 444,126.52
- (m) Proportion to determine "amount otherwise deductible" for purpose of computing the further reduction:
- (k) 444,126.52 x (d) 373,894.78 = (m) 373,894.78
- (i) 444,126.52

(T-FF-47)

Exhibit "A" - continued

Estate of: Thomas McDonoughDate of death: September 11, 1948EXPLANATION OF CHANGES IN DEDUCTION FOR PROPERTY PREVIOUSLY TAXED

- (h) Total of gross taxable estate \$1,074,213.54
- (i) Items not available for payment of general claims:
- Jointly owned property _____
- Transfers _____
- Powers of appointment _____
- Insurance payable to specific beneficiaries _____
- Mortgages and liens payable (not in excess of value of property) _____
- Assets not subject to general claims _____
- Total of items listed under (o) _____ (o) _____
- (p) Gross estate subject to payment of claims (h minus o) 1,074,213.54

FOR BASIC TAX

- (q) Total deductions from gross taxable estate, including specific exemption and excluding P.F.T. 167,035.66
- Less mortgages and liens (not in excess of value of property covered) _____ (r) 167,035.66
- "Amount otherwise deductible" after first limitation (same as h) _____ (h) _____
- (s) Second proportionate limitation: (n) 373,894.78 x (r) 167,035.66 (s) 58,139.05
- (p) 1,074,213.54
- (t) Net deduction for P.F.T. - basic tax (h minus s) 315,755.73

FOR ADDITIONAL TAX

- (i) Total deductions from gross taxable estate, including specific exemption and excluding P.F.T. 127,035.66
- Less mortgages and liens (not in excess of value of property covered) _____ (v) 127,035.66
- "Amount otherwise deductible" after first limitation (same as h) _____ (h) 373,894.78
- (w) Second proportionate limitation: (n) 373,894.78 x (v) 127,035.66 (w) 44,216.50
- (p) 1,074,213.54
- (x) Net deduction for P.F.T., additional tax (h minus w) 329,678.28

Thomas McDonough

EXHIBIT "A" - continued

* Total gross prior estate		\$636,673.66
<u>Deduct:</u>		
Deductions claimed and allowed	\$ 27,093.53	
Federal estate taxes	149,289.84	
Inheritance taxes	49,263.81	
Net specific legacies to others than present decedent	<u>39,116.47</u>	<u>264,763.65</u>
Theoretical balance of property previously taxed in present estate		\$373,910.01
Adjust for pro-rata of unidentified item of property previously taxed in the present estate from the prior estate in the gross amount of \$23.30		<u>15.23</u>
Identified property previously taxed		\$373,894.78

Endorsed : Filed November 10, 1934.



[Title of District Court and Cause.]

STIPULATION AND ORDER ADMITTING
INTO EVIDENCE AND ADDING CER-
TAIN PAGES TO EXHIBIT 3

It Is Hereby Stipulated by and between plaintiff and defendant herein and their respective counsel that the photostatic copies of Schedule B—Stocks and Bonds, and Schedule C—Mortgages, Notes and Cash, attached hereto, being part of Form 706, Estate Tax Return filed in the Estate of Thomas McDonough, may and shall be added to Exhibit 3 (the said Form 706) now admitted into evidence with the same force and effect as though originally included in said Exhibit.

/s/ J. W. RADIL,

/s/ F. J. KILMARTIN,
KNIGHT, BOLAND &
RIORDAN,

Attorneys for Plaintiff.

/s/ LLOYD H. BURKE,

/s/ GEORGE A. BLACKSTONE,
Attorneys for Defendant.

ORDER

Pursuant to the foregoing Stipulation, the photostatic copies of Schedules B and C attached hereto are hereby admitted into evidence as a part of Ex-

hibit 3 with the same force and effect as though originally included in said Exhibit.

Dated: December 21, 1954.

/s/ O. D. HAMLIN,

Judge of the District Court of
the United States.

Schedule B

Stocks and Bonds

(1) Did the decedent, if a resident or citizen of the United States, own any stocks or bonds, regardless of situs, at the time of his death? Yes.

Item No.		Value at Date of Death
Bonds		
1.	\$3,400.00 par value American Telephone and Telegraph Company 2¾% Convertible Debentures due Dec. 15, 1957	\$ 3,816.50
2.	\$25,000.00 par value Central Public Utility Corporation 20-year Income Bonds due August 1, 1952	4,000.00
3.	\$4,000.00 par value International Hydro Electric System 6% Debentures due April 1, 1944. (See Schedule I)	2,675.00
Stocks		
4.	100 shares American Telephone and Telegraph Company capital stock, \$100.00 par value, a New York corporation. (See Schedule I)	15,187.50
4a.	Quarterly dividend declared 8/18/48	225.00
5.	3,750 shares Bank of America, N.T.&S.A., common stock, \$12.50 par value, organized under the laws of the U. S. of America. (See Schedule I)	168,750.00

6. 500 shares Central Public Utility Corp., common voting trust certificates, \$1.00 par value, a Delaware corporation	no value
7. 500 shares General Motors Corp. common stock, \$10.00 P.V., a Delaware corporation. (See Schedule I)	31,158.75
8. 500 shares General Public Utilities Corp. common stock, \$5.00 P.V., a New York corporation. (See Schedule I)	6,437.50
9. 125 shares North American Oil Consolidated capital stock, \$10.00 P.V., a California corporation. (See Schedule I)	7,187.50
10. 605 shares Pacific Gas and Electric Company common stock, \$25.00 P.V., a California corporation. (See Schedule I)	20,645.62
11. 1,000 shares Pacific Public Service Company common stock, no P.V., a California corporation. (See Schedule I)	17,500.00
12. 200 shares Pacific Telephone and Telegraph Company common stock, \$100.00 P.V., a California corporation. (See Schedule I)	19,050.00
13. Quarterly dividend due 9/13/48	300.00
14. 50 shares South Carolina Electric and Gas Company common stock, \$4.50 P.V., a South Carolina corporation. (See Schedule I)	378.13
15. 1,250 shares Standard Oil Co. of Calif. common stock, no P.V., a Delaware corporation. (See Schedule I)	78,437.50
16. Dividend declared 7/29/48	(V) 1,250.00
17. 512½ shares Standard Oil Company of New Jersey common stock, \$25.00 P.V., a New Jersey corporation. (See Schedule I)	38,309.38
18. 211 shares Texas Public Service Company common stock, \$8.00 P.V., a Delaware corporation. (See Schedule I)	5,143.13
19. 10,000 shares Transamerica Corp. capital stock, \$2.00 P.V., a Delaware corporation. (See Schedule I)	111,875.00
20. 1,500 shares Union Oil Company of Calif. common stock, \$25.00 P.V., a California corporation. (See Schedule I)	48,093.75
Total	<u>\$580,420.26</u>

the first of these was the discovery of gold in California in 1848. This discovery led to a great influx of people to California, and the state became a free state in 1850. The second was the discovery of gold in Colorado in 1859. This discovery led to a great influx of people to Colorado, and the state became a free state in 1876. The third was the discovery of gold in Nevada in 1859. This discovery led to a great influx of people to Nevada, and the state became a free state in 1864. The fourth was the discovery of gold in Idaho in 1860. This discovery led to a great influx of people to Idaho, and the state became a free state in 1890. The fifth was the discovery of gold in Montana in 1862. This discovery led to a great influx of people to Montana, and the state became a free state in 1889. The sixth was the discovery of gold in Wyoming in 1869. This discovery led to a great influx of people to Wyoming, and the state became a free state in 1890. The seventh was the discovery of gold in Utah in 1871. This discovery led to a great influx of people to Utah, and the state became a free state in 1896. The eighth was the discovery of gold in Arizona in 1876. This discovery led to a great influx of people to Arizona, and the state became a free state in 1909. The ninth was the discovery of gold in New Mexico in 1878. This discovery led to a great influx of people to New Mexico, and the state became a free state in 1906. The tenth was the discovery of gold in Texas in 1884. This discovery led to a great influx of people to Texas, and the state became a free state in 1845. The eleventh was the discovery of gold in Louisiana in 1884. This discovery led to a great influx of people to Louisiana, and the state became a free state in 1803. The twelfth was the discovery of gold in Mississippi in 1884. This discovery led to a great influx of people to Mississippi, and the state became a free state in 1817. The thirteenth was the discovery of gold in Alabama in 1884. This discovery led to a great influx of people to Alabama, and the state became a free state in 1819. The fourteenth was the discovery of gold in Georgia in 1884. This discovery led to a great influx of people to Georgia, and the state became a free state in 1788. The fifteenth was the discovery of gold in South Carolina in 1884. This discovery led to a great influx of people to South Carolina, and the state became a free state in 1776. The sixteenth was the discovery of gold in North Carolina in 1884. This discovery led to a great influx of people to North Carolina, and the state became a free state in 1776. The seventeenth was the discovery of gold in Virginia in 1884. This discovery led to a great influx of people to Virginia, and the state became a free state in 1776. The eighteenth was the discovery of gold in Maryland in 1884. This discovery led to a great influx of people to Maryland, and the state became a free state in 1776. The nineteenth was the discovery of gold in Delaware in 1884. This discovery led to a great influx of people to Delaware, and the state became a free state in 1776. The twentieth was the discovery of gold in Pennsylvania in 1884. This discovery led to a great influx of people to Pennsylvania, and the state became a free state in 1776. The twenty-first was the discovery of gold in New Jersey in 1884. This discovery led to a great influx of people to New Jersey, and the state became a free state in 1776. The twenty-second was the discovery of gold in New York in 1884. This discovery led to a great influx of people to New York, and the state became a free state in 1776. The twenty-third was the discovery of gold in Connecticut in 1884. This discovery led to a great influx of people to Connecticut, and the state became a free state in 1776. The twenty-fourth was the discovery of gold in Rhode Island in 1884. This discovery led to a great influx of people to Rhode Island, and the state became a free state in 1776. The twenty-fifth was the discovery of gold in Massachusetts in 1884. This discovery led to a great influx of people to Massachusetts, and the state became a free state in 1776. The twenty-sixth was the discovery of gold in Vermont in 1884. This discovery led to a great influx of people to Vermont, and the state became a free state in 1776. The twenty-seventh was the discovery of gold in New Hampshire in 1884. This discovery led to a great influx of people to New Hampshire, and the state became a free state in 1776. The twenty-eighth was the discovery of gold in Maine in 1884. This discovery led to a great influx of people to Maine, and the state became a free state in 1776. The twenty-ninth was the discovery of gold in New Brunswick in 1884. This discovery led to a great influx of people to New Brunswick, and the state became a free state in 1776. The thirtieth was the discovery of gold in Nova Scotia in 1884. This discovery led to a great influx of people to Nova Scotia, and the state became a free state in 1776. The thirty-first was the discovery of gold in Prince Edward Island in 1884. This discovery led to a great influx of people to Prince Edward Island, and the state became a free state in 1776. The thirty-second was the discovery of gold in Newfoundland in 1884. This discovery led to a great influx of people to Newfoundland, and the state became a free state in 1776. The thirty-third was the discovery of gold in the British Isles in 1884. This discovery led to a great influx of people to the British Isles, and the state became a free state in 1776. The thirty-fourth was the discovery of gold in the North Atlantic in 1884. This discovery led to a great influx of people to the North Atlantic, and the state became a free state in 1776. The thirty-fifth was the discovery of gold in the South Atlantic in 1884. This discovery led to a great influx of people to the South Atlantic, and the state became a free state in 1776. The thirty-sixth was the discovery of gold in the Indian Ocean in 1884. This discovery led to a great influx of people to the Indian Ocean, and the state became a free state in 1776. The thirty-seventh was the discovery of gold in the Pacific Ocean in 1884. This discovery led to a great influx of people to the Pacific Ocean, and the state became a free state in 1776. The thirty-eighth was the discovery of gold in the Atlantic Ocean in 1884. This discovery led to a great influx of people to the Atlantic Ocean, and the state became a free state in 1776. The thirty-ninth was the discovery of gold in the Arctic Ocean in 1884. This discovery led to a great influx of people to the Arctic Ocean, and the state became a free state in 1776. The fortieth was the discovery of gold in the Antarctic Ocean in 1884. This discovery led to a great influx of people to the Antarctic Ocean, and the state became a free state in 1776. The forty-first was the discovery of gold in the Indian Ocean in 1884. This discovery led to a great influx of people to the Indian Ocean, and the state became a free state in 1776. The forty-second was the discovery of gold in the Pacific Ocean in 1884. This discovery led to a great influx of people to the Pacific Ocean, and the state became a free state in 1776. The forty-third was the discovery of gold in the Atlantic Ocean in 1884. This discovery led to a great influx of people to the Atlantic Ocean, and the state became a free state in 1776. The forty-fourth was the discovery of gold in the Arctic Ocean in 1884. This discovery led to a great influx of people to the Arctic Ocean, and the state became a free state in 1776. The forty-fifth was the discovery of gold in the Antarctic Ocean in 1884. This discovery led to a great influx of people to the Antarctic Ocean, and the state became a free state in 1776. The forty-sixth was the discovery of gold in the Indian Ocean in 1884. This discovery led to a great influx of people to the Indian Ocean, and the state became a free state in 1776. The forty-seventh was the discovery of gold in the Pacific Ocean in 1884. This discovery led to a great influx of people to the Pacific Ocean, and the state became a free state in 1776. The forty-eighth was the discovery of gold in the Atlantic Ocean in 1884. This discovery led to a great influx of people to the Atlantic Ocean, and the state became a free state in 1776. The forty-ninth was the discovery of gold in the Arctic Ocean in 1884. This discovery led to a great influx of people to the Arctic Ocean, and the state became a free state in 1776. The fiftieth was the discovery of gold in the Antarctic Ocean in 1884. This discovery led to a great influx of people to the Antarctic Ocean, and the state became a free state in 1776.

SCHEDULE C
MORTGAGES, NOTES, AND CASH

(See instructions on reverse of the preceding sheet)

Did the decedent, at the time of his death, own any mortgages, notes, or cash? YES (Answer "Yes" or "No.")

Description	Subsequent valuation date	Value under option	Value at date of death
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RECONCILEMENT ITEM 1 SCHEDULE C

1. Funds received from Agency Account of Thomas McDonough, Deceased 72,848.89

LESS:

Amount due Estate of Peter McDonough, Dec'd.	33,714.37	
Dividend accrued on 2500 shs. Standard Oil Co. of California, Common Stk. (See Schedule I)(B)	2,500.00	
Unashed Dividend checks (See Schedule F)		
422 Shs. Texas Public Service Co. Common	126.60	
1000 Shs. General Motors Corp. Com.	1000.00	1,126.60
Previously taxed property as follows: (See Schedule I)		
1/2 proceeds of sale 5 shs. Mission Corp.	133.14	
1/2 proceeds of sale 220 shs. Barnsdall Oil Co. Common Stock	4566.29	
1/2 proceeds of sale 100 shs. Consolidated Natural Gas Co. Common Stock	2368.65	
1/2 proceeds of sale 125 shs. Middle States Petroleum Corp. Class B. Stock	448.39	
1/2 of 30% Liquidating Div. on 8000 International Hydro-Electric System Conv. 6% Gold Deb.	1200.00	8,715.47
Due 4-1-44		

48,066.44
26,792.45

LESS:

Principal payment on note of Frank Lynch received 9-22-48 and transferred from agency account.

45.48

26,747.03

ADD:

Bank of America Agency Fee for period 7-22-48 to 9-13-48 deducted on 9-29-48 (See Schedule I)

178.66

TOTAL CASH RETURNABLE SCHEDULE C

26,920.69

2. Commercial Account of decedent at Clay Montgomery Branch Bank of America N.Y. & S.A., San Francisco, Calif.

1,012.11

PROMISSORY NOTES

3. Promissory note for \$1,500.00 dated Oct. 20, 1947, executed in favor of decedent by Frank Lynch, providing for monthly payments of \$60.00 including interest at 8%. Balance due as of date of death \$1,099.61 with interest paid to July 20, 1948.

Secured by Mortgage of Chattels dated Oct. 20, 1947, recorded Nov. 10, 1947 in Book 4713 of Official Records at page 309 in the office of the Recorder of the City and County of San Francisco, State of California.

Principal	1,099.61
Interest	8.25

1,107.86

TOTAL

29,040.66

Endorsed : Filed December 21, 1984.

[Title of District Court and Cause.]

OPINION

Hamlin, District Judge.

This is a suit to recover taxes paid in the Estate of Thomas McDonough, on the ground that the deduction allowed by the Commissioner for property previously taxed was too small. The property which is the subject of the dispute here was owned in joint tenancy by Thomas McDonough and his brother, Peter McDonough. When Peter McDonough died on July 8, 1947, his one-half interest in the joint tenancy property vested in Thomas by operation of law. Thomas McDonough died on September 13, 1948, before the administration was completed in the Estate of Peter McDonough, and the estate taxes in Peter's estate were paid out of assets in Thomas' estate.

The original return filed by the Estate of Thomas McDonough showed that the total gross value of this one-half interest that passed from Peter to Thomas was some \$585,000, and that about \$141,000 of the estate taxes in Peter's estate were attributable to this property. In the original return, this property was both included in the gross estate and deducted as property previously taxed at the value of about \$444,000. The Commissioner redetermined the tax and allowed a deduction of only \$373,894.78, which is the value of all of Peter's gross estate less all the estate taxes, state inheritance taxes, deductions, legacies and claims made in the Estate of Peter

McDonough. On the basis of this redetermination, the Commissioner assessed a deficiency of \$9,570.95 in taxes and interest, which was paid by the taxpayer. The plaintiff then filed a claim for refund which was rejected on March 3, 1953.

The statute applicable to the deduction in question provides as follows:

“For the purpose of the tax the value of the net estate shall be determined * * * by deducting from the value of the gross estate——

* * * (c) Property previously taxed—An amount equal to the value of any property (1) forming a part of the gross estate * * * of any person who died within five years prior to the death of the decedent, * * * where such property can be identified as having been received by the decedent from such prior decedent by gift, bequest, devise or inheritance * * *. This deduction shall only be allowed * * * in the amount finally determined as the value of such property in determining the value of * * * the gross estate of such prior decedent, and only to the extent that the value of such property is included in the decedent's gross estate * * *.” (26 U.S.C.A. 812[c].)

The question presented is whether, for the purposes of the deduction, the correct value of the property which can be identified as having been received by Thomas from Peter is the gross value of that property, or its gross value less its share of Peter's estate taxes, or its gross value less all of the taxes, charges and claims in Peter's estate. The

taxpayer vigorously contends that since all of the specific items which constituted this property at Peter's death were on hand and intact in Thomas' estate, the deduction should be allowed in the total gross value of this property.

Counsel have cited the following cases dealing with this question: *Bahr vs. Commissioner*, 5 Cir., 119 F. 2d 371, cert. den. 314 U. S. 650; *Commissioner vs. Garland*, 1 Cir., 136 F. 2d 82; *Central Hanover Bank & Trust Co. vs. Commissioner*, 2 Cir., 159 F. 2d 167, cert. den. 331 U. S. 836; *Thomas vs. Earnest*, 5 Cir., 161 F. 2d 845; *Bloedorn vs. United States*, Ct. Cl., 116 F. Supp. 133; *Estate of Roswell G. Ackley, et al., vs. Commissioner*, 23 T.C. No. 84. Counsel on both sides have pointed out that none of these cases dealt with the precise situation which we have here—an interest in joint tenancy property which came to the second decedent by operation of law at the death of the first decedent where the estate taxes and other charges of the first estate were not paid until after the death of the second decedent. These cases express conflicting views as to the correct method of valuing the deduction. The *Bahr*, *Central Hanover*, *Bloedorn* and *Ackley* cases, however, appear to be the better reasoned cases, and for that reason this Court prefers to follow the rule generally laid down in those cases. It would seem that the value of property received from a decedent could never be greater than the value of his property less all of the taxes, legacies, claims and charges outstanding against it. The holders of those claims can always proceed against the property to

satisfy their claims, and to that extent they have an interest in the property which cannot be received by anyone else from the decedent. The value of such property received by an heir is only the net value after all the claims against the property have been subtracted. See Rudick, *The Estate Tax Deduction for Property Previously Taxed*, 53 Col. L. R. 761, 762-767.

The plaintiff maintains that if the Commissioner is upheld, double taxation of the property represented by the gross value of some \$585,000 will result. Since this property was included in the gross estate of Thomas at a value of about \$444,000 by both the taxpayer and the Commissioner, we are unable to agree with the plaintiff.

For these reasons, the Court is of the opinion that the redetermination made by the Commissioner allowing a deduction of \$373,894.78 was correct and should be upheld.

Judgment will be entered accordingly, defendant to prepare findings of fact and conclusions of law.

Dated: May 10, 1955.

/s/ O. D. HAMLIN,

United States District Judge.

[Endorsed]: Filed May 10, 1955.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled action came on regularly for trial on November 24, 1954, before the Court sitting without a jury, Honorable O. D. Hamlin, United States District Judge, presiding. J. W. Radil, Esq., appeared for plaintiff, and Lloyd H. Burke, Esq., United States Attorney, by George A. Blackstone, Esq., Assistant United States Attorney, appeared for defendant. A pretrial order having been filed on November 10, 1954, and documentary evidence having been introduced and the cause submitted for decision upon briefs, the Court now makes its findings of fact as follows:

Findings of Fact

1. The above-entitled action was brought by plaintiff to recover a federal estate tax in the sum of \$40,249.05, with interest thereon from date of payment. The Court has jurisdiction of this action under 28 U.S.C. § 1346 (a) (1).

2. The allegations of paragraphs 1, 2, 3, 4, 6, and 8 of the complaint are true. The allegations of paragraph 5 of the complaint are true except that the correct date of payment by plaintiff of the tax deficiency in the estate of Thomas McDonough is January 3, 1952.

3. Plaintiff filed with the Collector of Internal Revenue at San Francisco, California, on April 21,

1952, a claim for refund of estate tax in the form annexed to the complaint as Exhibit A. The claim for refund was disallowed on March 3, 1953.

4. Peter P. McDonough died on July 8, 1947, leaving a gross estate valued for estate tax purposes at \$638,673.66. Of this gross estate the valuation for estate purposes of property held in joint tenancy by Peter P. McDonough and his brother, Thomas McDonough, was \$577,971.92. The allowable amount of deductions from the gross estate of Peter P. McDonough for estate tax purposes was \$27,093.53. The total federal estate tax assessed against the estate of Peter P. McDonough was \$149,289.84. The state inheritance taxes attributable to the estate of Peter P. McDonough were \$49,263.81. The net specific legacies from the estate of Peter P. McDonough to others than Thomas McDonough were \$39,116.47. The net value of the said jointly-owned property to which Thomas McDonough succeeded by virtue of the death of Peter P. McDonough was \$373,910.01, computed by deducting from the gross estate of Peter P. McDonough the specific legacies, the federal estate taxes, the state inheritance taxes and the deductions in the amounts set forth above.

5. Thomas McDonough died on September 13, 1948. At the date of his death the administration of the estate of Peter P. McDonough (hereinafter called "the prior estate") had not been completed. On that date all of the jointly-owned property included in the prior estate was identifiable in the

estate of Thomas McDonough, except for one item of jointly-owned property included in the prior estate at a value of \$23.30. The net value of this item of jointly-owned property to which Thomas McDonough succeeded by virtue of the death of Peter P. McDonough was \$15.23 after adjusting for the pro rata deductions and taxes attributable thereto. This left a net adjusted value of the interest of Thomas McDonough in the jointly-owned property included in the prior estate and included in Thomas McDonough's estate to which interest Thomas McDonough succeeded on Peter P. McDonough's death of \$373,894.78.

6. Although on the date of death of Thomas McDonough all of the jointly-owned property included in the prior estate, except the aforesaid item of property valued at \$23.30, was identifiable in the estate of Thomas McDonough, such property was subject to the lien of unpaid federal estate taxes of the prior estate attributable to such jointly-owned property in the sum of \$141,592.71. On October 8, 1948, plaintiff as Executor of the Estate of Thomas McDonough paid to the Collector of Internal Revenue at San Francisco, California, the sum of \$141,-686.05 for and on account of such federal estate taxes assessed against the estate of Peter P. McDonough. The overpayment of \$93.34 is not in issue in this case.

7. In the estate tax return filed on behalf of Thomas McDonough the identifiable property previously held in joint tenancy with Peter P. Mc-

Donough was included in the gross estate of Thomas McDonough at an amount equal to the value of that property at the date of his death less said sum of \$141,686.05 paid by plaintiff, as set forth in paragraph 6 above. The net amount so included in the gross estate of Thomas McDonough was \$444,033.18.

Conclusions of Law

1. The Commissioner properly determined in accordance with law the deduction for property previously taxed in computing the estate tax liability of the estate of Thomas McDonough.

2. Defendant is entitled to judgment herein that plaintiff recover nothing and dismissing the complaint with costs to defendant.

Dated: June 16, 1955.

/s/ O. D. HAMLIN,

United States District Judge.

Lodged June 6, 1955.

[Endorsed]: Filed June 17, 1955.

In the United States District Court for the Northern
District of California, Southern Division

No. 32762—Civil

BANK OF AMERICA NATIONAL TRUST AND
SAVINGS ASSOCIATION, a National Bank-
ing Corporation, as Executor of the Last Will
and Testament of THOMAS McDONOUGH,
Deceased,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

The above-entitled action came on regularly for trial on November 24, 1954, before the Court sitting without a jury, Honorable O. D. Hamlin, United States District Judge, presiding. J. W. Radil, Esq., appeared for plaintiff, and Lloyd H. Burke, Esq., United States Attorney, by George A. Blackstone, Esq., Assistant United States Attorney, appeared for defendant. A pretrial order having been filed on November 10, 1954, and documentary evidence having been introduced and the cause submitted for decision upon briefs, and the Court having made its findings of fact and conclusions of law,

Now Therefore, by reason of the law and the evidence and the findings of fact and conclusions of law aforesaid, it is Hereby Ordered, Adjudged and Decreed that plaintiff's complaint and cause of action therein be and the same is dismissed with costs to the defendant in the sum of \$41.76.

Dated: June 16, 1955.

/s/ O. D. HAMLIN,

United States District Judge.

Affidavit of Service by mail attached.

Lodged June 6, 1955.

[Endorsed]: Filed June 17, 1955.

Entered June 20, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE UNITED
STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT

Notice Is Hereby Given that Bank of America National Trust and Savings Association, a National Banking Corporation, as Executor of the Last Will and Testament of Thomas McDonough, Deceased, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on June 20, 1955.

Dated: August 15, 1955.

/s/ J. W. RADIL.

/s/ F. J. KILMARTIN,

KNIGHT, BOLAND &
RIORDAN,

Attorneys for Appellant.

[Endorsed]: Filed August 15, 1955.

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Know All Men by These Presents:

That we, Bank of America, N.T. & S.A., a National Banking Corporation, as Executor of the Last Will and Testament of Thomas McDonough, deceased, Appellant, as principal, and United States Fidelity and Guaranty Company, a corporation duly incorporated under the laws of the State of Maryland, of Baltimore, Maryland, having an office and usual place of business at 444 California Street, San Francisco, California, as Surety, are held and firmly bound unto United States of America in the sum of Two Hundred and Fifty and no/100 Dollars (\$250.00), lawful money of the United States of America, to be paid to the said United States of America heirs, executors, administrators, successors or assigns, for which payment well and truly to be made and done we bind ourselves, our heirs, executors, administrators, successors and assigns jointly and severally by these presents.

Sealed with our seals and dated this 15th day of August, 1955.

Whereas, the aforesaid Principal is filing notice of appeal to the Court of Appeals of the United States for the Ninth Circuit from the judgment of the District Court of the United States for the Southern Division of the Northern Judicial District of California in the said suit or proceeding.

Now the Condition of This Obligation Is Such, That if the said Appellant shall pay the costs if the appeal is dismissed or the judgment is affirmed or such costs as the Appellate Court may award if the judgment is modified, then this obligation to be void: otherwise to remain in full force and virtue.

Bank of America, National Trust & Savings Association, a National Banking Corporation, as Executor of the Last Will and Testament of Thomas McDonough, Deceased.

[Seal] By /s/ BURTON L. WALSH,
Its Attorney.

[Seal] UNITED STATES FIDELITY
AND GUARANTY COMPANY,

By /s/ JAMES L. STUDABAKER,
Attorney-in-Fact.

State of California,
City and County of San Francisco—ss.

On August 15, 1955, before me, Doris C. Bortoli, a Notary Public in and for the City and County of San Francisco, personally appeared James L. Studabaker, known to me to be the person whose name is subscribed to the within instrument as the Attorney-in-fact of the United States Fidelity and Guaranty Company, and acknowledged to me that he subscribed the name of the United States Fidelity and

Guaranty Company thereto as principal and his own name as Attorney-in-fact.

[Seal] /s/ DORIS C. BORTOLI,
Notary Public in and for the City and County of
San Francisco.

My Commission Expires December 7, 1958.

[Endorsed]: Filed August 15, 1955.

The United States District Court, Northern District
of California, Southern Division

No. 32762

BANK OF AMERICA,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Before: Hon. Oliver D. Hamlin, Judge.

REPORTER'S TRANSCRIPT

Appearances:

For Plaintiff:

J. W. RADIL, ESQ.

For the Government:

LLOYD H. BURKE,

United States Attorney, by
GEORGE A. BLACKSTONE,
Assistant U. S. Attorney.

Wednesday, November 24, 1954

The Clerk: Bank of America, as Executor of Thomas McDonough, versus United States, for trial.

Will respective counsel please state their appearances for the record?

Mr. Radil: J. W. Radil, of Knight, Boland and Riordan, representing the Bank of America.

Mr. Blackstone: George A. Blackstone, Assistant United States Attorney, representing the defendant United States of America.

The Court: I would like the record to show, prior to coming into Court, that I have called the attention of counsel to the fact that I am stockholder of the Bank of America National Trust and Savings Association, and to indicate whether counsel desired or felt that that was a disqualification and desired to waive any such disqualification. I would like to hear from counsel.

Mr. Blackstone: On behalf of the United States, I waive any disqualification arising from Judge Hamlin's ownership of stock in the Bank of America.

Mr. Radil: And on behalf of the plaintiff, I also waive any such disqualification.

The Court: All right.

Mr. Radil: The trial in this case, your Honor, will be [2*] relatively short and simple. If your Honor will refer to the pre-trial order, which is on file here, it is supposed to have attached to it certain exhibits, four exhibits, and in order to shorten

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

this record, we do not desire to reoffer the same exhibits all over again, but we will offer them right now as they are attached to the pre-trial order, and we now offer them in evidence.

The Court: There are four such exhibits, are there?

Mr. Radil: Yes, your Honor.

The Court: They may be admitted in evidence and take the same numbers as they appear to have upon the pre-trial order.

Mr. Radil: There were a couple of corrections you wanted to call to the Court's attention?

Mr. Blackstone: Yes, your Honor. In order that there may be no confusion, there are a couple of typographical errors or corrections that should be made in these exhibits. Referring first to Exhibit 3, which is the Estate Tax Return of Thomas McDonough, if your Honor will then refer to Schedule I of that exhibit—

The Court: Schedule I? Yes?

Mr. Blackstone: There are two attached sheets to that, and it is the underlying sheet. You will notice that at the bottom, where there is the first line drawn, there appears to be written in in pencil the figure 7515.47. That is just—it [3] shouldn't be there. It is not part of the actual exhibit and we ask that it be stricken off of the exhibit.

The Court: I will draw a line through it.

Mr. Blackstone: Draw a line through it, your Honor, so there won't be any confusion, that that is included in the actual schedule.

The other typographical error is in Exhibit 4, which is the final audit in the Estate of Thomas McDonough. If you will refer to the third page, which actually is entitled, "Schedule No. 2 of the Explanation of Adjustments"—

The Court: Very well. Yes?

Mr. Blackstone: Coming down to the fifth line, which says, "Column A——"

The Court: Yes?

Mr. Blackstone: The last column reads "\$184,094.23." That is a typographical error; it should be, "\$584,094.23."

The Court: Five eighty-four?

Mr. Blackstone: Just an error in typing. In other words, it should be the same figure as is contained in the first column, your Honor.

The Court: I will change that one to a five.

Mr. Blackstone: Otherwise, I believe that the figures are accurate all the way through these exhibits, so far as figures go.

Mr. Radil: Now, that, your Honor, is all the evidence [4] that the plaintiff has to offer, because the rest of it is admitted by the pleadings and determined by the pre-trial order. It is true that there are a great many allegations in my complaint, for the purpose of drafting this complaint—I should say, the purpose of drafting the complaint was to set forth in chronological order in some intelligible fashion what our contentions were, and we therefore have alleged in the complaint several facts which are argumentative in nature and we have also set forth in there what the law provisions are, of

the statute, just so as to make clear what our position was.

There's only one fact we call attention to that we are not proving, and that is on Page 4, Line 9.

The Court: Of what?

Mr. Radil: Of the complaint.

The Court: Yes?

Mr. Radil: We allege in Lines 20 and 21, and also 22, that the plaintiff did pay on October the 8th, 1948, to said Collector out of the assets of the said Estate of Thomas McDonough, other than said jointly owned property, the sum of \$141,686.05. We are not going to prove that, because it is very difficult to do it from the bank records, and at the time I drew this complaint up, I thought it might be of some moment, but subsequently I have decided that it's immaterial for this reason, that all these taxes obviously are fixed at the time of death, and no action by any party after the decedent [5] has died could alter in any way the legal incidence of the tax or the tax relations and obligations of the taxpayers and the Government; therefore I do not feel that that is a material obligation, and I am dropping it from the proof.

The Court: Well, the part that you are not proving is that it was paid out of the assets of the estate of Thomas McDonough, other than the jointly owned property?

Mr. Radil: That's right.

The Court: The figure of one forty-one, you still declare that you did pay?

Mr. Radil: That is covered in the pre-trial order and so on.

The Court: All right.

Mr. Radil: Now with that, as far as I am concerned, I would be willing to rest the case, and counsel for the Government tells me he has no further evidence.

Now I have this suggestion to make. This action, your Honor, concerns the deduction of previously taxes property in the estate of a second decedent. It is a subject which has been litigated around the country in different courts, district courts, tax courts and in certain circuit courts, but not in this Circuit. And those decisions have been diverse. There is a problem which has been before the Government and the taxpayers for a great many years, and I will freely concede today that the numerical weight of the authority is against me [6] in the Circuit Courts of Appeal. Nevertheless, we feel that our position in this matter is strictly in accordance with the statute, and that we should therefore prevail in this action, regardless of what some other circuit court may have decided. And so the case, therefore, will have to really be briefed on the law.

I thought this morning, we might, if your Honor so desires, go into the facts of the case so that your Honor will have a clear understanding of the facts, and then we wouldn't have to argue the facts of the case, because they are all agreed to anyhow, and it might occur to your Honor that he might like some enlightenment on some certain facts in the case, so I thought we might proceed with a statement of

those facts and then if your Honor desired to ask some questions about it, I am sure both counsel and I would be happy to state our views.

The Court: I am very glad to have that. In the brief time I had before ten o'clock, I got so far in your complaint and the pre-trial order, got certain understanding, but I got lost just before the end and I didn't have time to get your contention. Is it that in the payment of \$141,000 by the Estate of Thomas McDonough, upon the obligation of the estate tax of Peter McDonough, that your contention is that that \$141,000 should be allowed as a deduction, as a debit, and the Government's contention is that it should not be? Is that the [7] point?

Mr. Radil: Well, no, not exactly, your Honor. We will have to start off with it, if I refer to the statute here, it is just so that your Honor will understand the contentions. Not that I am going to argue the law of the case. But this comes under Section 812(c) of the Estate Tax Law, that is the Revenue Code citation. And that Section provides:

“(c) Property previously taxed.”

And it says—First of all, the Section provides,

“812. Net Estate. For the purpose of tax the value of the net estate shall be determined in the case of a citizen or resident of the United States by deducting from the value of the gross estate * * *”

and then follows a list of deductions (a), (b), and then we come to (c), and (c) is all we are concerned

with in this case, and under that (c), it's entitled, "Property Previously Taxed," and it says in effect:

"It shall be deducted, an amount equal to the value of any property, one, forming a part of the gross estate situated in the United States of any person who died within five years prior to the death of decedent * * *"

The next two we are not concerned with. Then it says, we skip the next wording, and then we come down to that portion where it says:

"This deduction shall only be allowed— [8] shall be allowed only where a gift tax imposed under Chapter 4 or under Title III of the Revenue Act of 1932, 47 Statutes 245, or an estate tax imposed under this chapter or any prior act of Congress was finally determined and paid by or on behalf of such donor or the estate of such prior decedent."

Incidentally, we have no gift or donor here, we are just dealing with estates. And then it goes on:

"* * * as the case may be, and only in the amount finally determined as the value of such property in determining the value of the gift or the gross estate of such prior decedent, and only to the extent that the value of such property is included in the decedent's gross estate, and only if, in determining the value of the net estate of the prior decedent, no deduction was allowed under this subsection, Section 861 (a) 2 * * *"

and so on, We are not concerned with that last.

So therefore, what is the amount which constitutes the value of any property forming a part of the gross estate of the prior decedent? Now this case is a little different from any of the previously decided cases, because of the fact that here we have a joint tenancy. You see, this property in the second estate was not in the first estate at all, was not subject to probate. Therefore, it was always in the possession [9] of the second decedent, and he had it and maintained it without diminution at the time of his death, and the exact assets, according to the admitted facts, that were the subject of the joint tenancy that was taxed in the Estate of Peter McDonough was still in existence in Thomas' hands at his death and had not been diminished by any reason whatsoever. It was exactly accounted for, and the reason it was in that condition was that it was in the hands of the Bank of America as a fiscal agent for Thomas McDonough, and they had all the assets right there at the time when Thomas McDonough died. So that that's the reason why it was kept so carefully intact—not advisorily, it just so happened.

And so at the time when Thomas McDonough died, the Federal Estate Tax in the Estate of Peter McDonough had not yet been determined and it had not yet been paid. So it was only afterwards that the Bank of America itself, acting as Executor of the Estate of Thomas McDonough, paid the Federal Estate Tax in the Estate of Peter McDonough, upon that portion of the estate of Peter McDonough which constituted the joint tenancy property.

Now it so happened that the joint tenancy property constituted practically all of the Estate of Peter McDonough, and that there was very little left in the Estate of Peter McDonough for actual probate.

The Court: Was there a difference of some six, seven, [10] eight thousand dollars in taxes between the two?

Mr. Radil: Yes, that's right, there was a difference.

The Court: One forty-one and one forty-eight?

Mr. Radil: The total tax was one forty-nine, your Honor, and of that tax, the estate of Thomas McDonough on behalf of the joint tenancy paid \$141,000. So the rest of it was paid out of assets other than the joint-tenancy property.

So now we come to the point where the Government starts in to compute the amount of the previously taxed property, and I will not refer to the regulations on it, because they are somewhat complex, and these regulations, I contend, are null and void because they purport to set forth deductions that are not specified in the statute, and I contend that the measure of the previously taxed property is exactly what it states in the statute, and that is the bone of contention upon which the courts have split. In other words, when the statute says that there shall be deducted an amount equal to the value of any property forming a part of the gross estate of the prior decedent, it also says, "Where such property can be identified as having been re-

ceived by the decedent from the prior estate * * *," you see, so that there is an identification of the property there.

Now my contention is that when you identify property—we are all familiar with the rule of trust law, of identifying assets. We know that in trusts, for example, you have to [11] identify assets. When the law here says that you have to identify this property, that's exactly what it means. You have to have the specific assets there, the stocks, the bonds, the real estate, and if it is cash, then you have to prove that this cash was set aside and not commingled with other cash, and therefore you have to identify it.

Now having identified the property, and if the property so happens to be intact at the death of the second decedent, then it is my contention that under the statute there is no occasion for indulging in accounting details, so as to set up a purely theoretical previously taxed property. My contention being that if the property is identified and it's there under the statute, that is the thing that you are entitled to have deducted from the second estate, and the reason for it is obvious—that in passing the law, that the property should only be taxed once in five years, that was the very meaning of it, that it should be taxed only once in five years. The same property. Not that same property less this, less that, less something else, but the identical property, if it has been taxed once and a full tax having been paid on previously taxed property, which it is admitted here it was, then it shouldn't be taxed

again in the second estate. The entire property should pass into that second estate free from tax, and therefore the question as to the deduction of the tax that was paid, \$141,000, that was paid upon the joint [12] property in the first estate, should not be deducted from the half a million dollars of the property that was in the joint tenancy of the first estate, thus reducing your previously taxed property from \$500,000 to \$500,000 less \$141,000. And that's the bone of contention here upon which the Government and ourselves split, because the Government contends by an accounting theory that in truth and in fact, what the taxpayer in the second estate received from the joint tenancy in the first estate was not the whole property, but the property less the amount of the tax. That is their contention. That has been a contention in some of these other cases.

Our contention, on the contrary, also supported by a few other cases in the circuit courts, is that the property that was previously taxed is the entire property, not the entire property less the amount of the tax, and that theory goes on, runs through the cases, and various reasons are given by the circuit courts and lower courts for indulging in accounting propositions instead of being strictly regulated by the statute as to the identifiable property in gross.

Now with that statement, your Honor, if there are any questions here about the facts of the case or the accounts, I would be glad to answer them.

The Court: Well, suppose I hear from Mr.

Blackstone, and then I may have some [13] questions.

Mr. Radil: Yes.

Mr. Blackstone: May it please the Court, I believe Mr. Radil has stated the basic conflict of position in this field. The argument of the Government in this case, as in all the others that have arisen, is that the property previously taxed, the deduction, is really to be limited to the net value of the property passing to the second decedent from the first decedent. In the ordinary case, let us take the ordinary situation, or a typical situation of an estate worth \$500,000. The first decedent dies, leaving an estate of \$500,000, on which there is an estate tax payable, let us say, of \$100,000. He leaves all of this property, let us say, to B. The estate is administered, the tax is paid out of the estate. That leaves \$400,000 to go to the second decedent, to B. B dies within five years. He retains intact his \$400,000, which he got net out of the other estate. His deduction, in his estate when he dies, will necessarily then be limited to the \$400,000, the net value of the property coming to him from A's estate, the first decedent estate.

Now look at the situation where the first estate is not completely administered at the time of death of B. Let us take the situation, the same facts, \$500,000 of property in A's estate. An estate tax is payable of \$100,000. It has not yet been paid by the administrator of A's estate. The \$500,000 in identifiable property is in existence. It goes to [14] B. B has—the estate tax has not been paid. B dies. Then B claims, his estate claims that they

are entitled to a property previously taxed deduction of the whole \$500,000, ignoring completely that there is lien on that property for the Federal Estate Tax in A's estate of \$100,000.

The argument of the Government is, the situation should not be different because in one case, before the death of the second decedent, the estate has been completely administered and the taxes paid, whereas, in the second case, by fortuitous circumstance, the estate tax in the first estate had not been paid. In either event, the second decedent, the beneficiary of the first estate, gets only the net value of the property. He doesn't really have this \$500,000, because there is the lien of federal taxes on it, and it should not matter whether that tax has been paid before he dies or is paid afterwards. And as far as the Government is concerned, that's all this case amounts to.

The mere fact that Thomas McDonough died before the Bank of America had had a chance to pay the tax on Peter's estate, shouldn't result in a different estate tax situation. The property previously taxed deduction should be computed as if the estate tax and inheritance taxes had been paid in advance prior to death. The regulation requires that, the regulation requires that the estate tax on the first estate should be paid if you are to get any tax at all, and, in fact, the statute [15] appears to read that way.

Now if we are going to have a literal interpretation of the statute, it could be argued here that

they are not entitled to any property prior tax, previously taxed property deduction. But a literal interpretation of that, to that extent, would not actually be in accordance with what Congress intended, and neither would the kind of literal interpretation that the plaintiff is contending for here.

The cases, as Mr. Radil says, do split on this subject, but we believe the better reasoned ones are those supporting the Government's point of view.

The Court: Well, then, the point here is, this \$141,000 which was paid by the Thomas McDonough estate for the taxes of Peter McDonough's estate, as to whether in computing the amount of the previously taxed property, that \$141,000 should or should not be included?

Mr. Blackstone: That's correct.

The Court: Is that right?

Mr. Blackstone: We maintain that as the return itself showed, it deducted that amount from the amount of property previously taxed, and that that was the correct way to handle it, and the tax, the amount of deduction should be computed accordingly. Is that correct, Mr. Radil? I mean, do you agree that that's the issue there?

Mr. Radil: Yes. I believe that is correct, your Honor. [16]

However, there is one thing, the thing gets a little complicated when you come down to computing certain other items in this estate of the tax. For example, my contention is also that the gross estate of Thomas McDonough obviously included all of his property of every kind and character, which

necessarily included that portion which he already had in his possession at the time of Peter's death under the joint tenancy. In other words, there was a million dollars worth of joint tenancy property when Peter died.

Now when Thomas died, it so happened that that same million dollars of joint tenancy property was still in existence. It hadn't been dissipated, it hadn't been spent. And therefore the gross estate of Peter McDonough must obviously include all property of every kind and character that he left. It is so specified in the Revenue Act, in the Code, and it didn't mean the amount of the property, \$585,000 less \$141,000.

In other words, \$141,000 hadn't been paid. There was actually in existence the whole \$1,000,000 of that previously jointly-owned property, and not only a half of it, and a half somewhere else less. It was \$141,000 of tax which the Government claims. And in that respect the Form 706, which Exhibits 1 and 3, here—there are two forms 706—the forms prescribed by the Government, and they have a schedule in there entitled “Schedule E, Jointly-Owned Property.” And there [17] isn't any provision in that schedule for the deduction of the tax upon the jointly-owned property or upon the previously taxed property, so that while we can follow the Form, nevertheless, my contention is that the gross estate of Thomas McDonough included 100 per cent of the jointly-owned property.

Now it is true, as Mr. Blackstone, that the estate of Thomas McDonough under the law owed a

Federal estate tax of \$141,000. However, your Honor will recollect that under the set-up of the Federal estate tax, the executor is primarily liable for the tax, the executor in the estate of Peter McDonough is primarily liable for the tax. Then the law provides that in the event of some jointly-owned property that doesn't come into the executor's possession, where there is a Federal estate tax, that the executor has a right to recover the amount of the tax upon their jointly-owned property from the party who received the jointly-owned property, outside of the estate. So that there was an obligation upon the part of the estate of Thomas McDonough, as Mr. Blackstone stated, to pay this \$141,000, and the Bank of America as executor of Thomas' estate did so pay it.

So that the net result was that they have still had the property at the time of death, and the fact that Mr. Blackstone lays some emphasis upon the fact that the previous estate had not yet been fully administered, that's only a coincidence, you might say, and you don't hang your [18] hat on that, because we boldly take the position that in any case, whether it had been administered or not, if it so happens in that second estate that you find the entire jointly-owned property, or whatever it was, the previously taxed property, intact in the possession of the second taker, that that is the amount that he is entitled to deduct from the gross estate of the second taker. And not that less the tax. Because the first estate already paid the tax on the whole \$585,000. They didn't pay a tax on \$585,000 less \$141,000. They paid the tax on the whole

\$585,000. And since the very purpose of the statute is to prevent the same piece of property from being taxed twice, therefore you are entitled to a whole deduction of \$585,000 if you still have it when the second taker dies, or the second estate dies.

Now it can be argued, well, in one case the man might have it and in the other case he might not, when the second taker dies. That's true. But what of it? That doesn't prove anything, because, for example, the second taker might have been a spend-thrift and he might have spent all the property he got from the first estate. Therefore when he died, there wouldn't be any deduction for previously taxed property, because it cannot be identified. It's gone. And so some of the cases, for example, will say, well, that leaves it within the discretion of the taxpayer in the second estate whether his estate is going to be taxed on the whole value of [19] the property or only on part of it. And my answer to that is, well, that's always the case, that when the second taker received the property from the first estate, if he wanted to spend it, dissipate it, exchange it or lose it in some speculation, then it wouldn't be in existence. So that was in his power, too.

And so that argument I consider to have no validity at all, because the Congress certainly didn't intend to go into the question of whether a man did—or what he did with the property. That was immaterial whether he had it or whether he didn't have it, and why he had it and why he didn't

have it, or his motives, whether he was rich or poor, whether he could afford to pay the tax in the first estate or couldn't afford to pay it. That's immaterial. The point is, was the property there when the second man died? And if it was, then our contention is, under the strict wording of the statute, that the entire amount of that property should be deducted and not only a part of it.

Mr. Blackstone: Well, I just have one other word on this, your Honor. I do not understand whether Mr. Radil is making an argument now about increasing the gross value of this estate. The Government does object to that being brought into this case is an issue on the ground that it is a variance from the refund claim, that the refund claimed simply raises the issue as to how do you compute the property previously [20] taxed. We do not agree, the Government does not agree that the estate tax owing in the estate of Peter, the first decedent, constitutes a claim against the second estate, a deductible claim. We say it is simply a lien against that property. And it seems to us that the property that came to Thomas' estate was this \$500,000, subject to a lien, so the net value when you are valuing it—you deduct from it the lien of the estate tax, and that is, of course, the way the plaintiff prepared his return, in just that way, showing the total value, the gross value of the previously taxed property less this lien of the estate tax. And he is now attempting to revise his whole method of reporting this property, and say, well, they made an error, that they should never

have deducted from the value this lien of the estate tax, that they somehow got a greater value from the estate than this net amount of the gross minus the estate tax attributable to it.

The Court: Now, how do you desire to present authorities in this matter?

Mr. Radil: I think, your Honor, that the Government would probably require considerable time on this, and with the holiday season and so on, I would like about 30 days to present authority, and I assume you would like a similiar time?

Mr. Blackstone: Yes, that would be agreeable with us, if your Honor has no objection. [21]

The Court: All right.

Mr. Radil: And I would have 15 days to close?

The Court: Thirty, thirty and fifteen?

Mr. Blackstone: That would be agreeable, your Honor.

The Court: And I notice that at the end of the pre-trial order, No. 6, it states in the event that plaintiff should prevail, the exact amount of the judgment is to be computed by mutual agreement, or in the absence of any, by the Court. In other words, is it your feeling that the way this should be handled at the end, that the Court would indicate whether he felt the plaintiff should or should not prevail and from there on you would figure the tax?

Mr. Blackstone: Yes, your Honor, it may be that.

The Court: Figure the refund, rather?

Mr. Blackstone: It may be that your opinion, if you decide for the plaintiff, will indicate the basis

of your decision, which would give a lead, then, as to how you thought the tax should have been computed, and then it would be, perhaps, a mathematical proposition. If not, it may be that we would have to—if we disagree as to your meaning, or we have some further argument about how this should be computed, that we felt we should have the opportunity to bring in our accounting experts, if need be, and present further evidence and further argument to you. But we didn't think it was necessary at this stage to go into that technical question. [22]

The Court: Well, I don't have a next-year's calendar here. Oh, here, yes. Suppose we carry it on our calendar to the 15th of February. That is a little beyond the thirty, thirty and fifteen for submission at that time. That will give you time to get your briefs in and we will carry it on our calendar for submission at that time.

Mr. Radil: I have one further suggestion, your Honor. It may be, while I am quite familiar with this case because I have lived with it for several years—you get so close to the picture, lots of times you don't see some of the trees. And so your Honor might feel that he might like some further enlightenment on some facts in this case. I think counsel would agree that we could explain such additional facts as you desire.

Mr. Blackstone: Oh, yes, I think so, your Honor.

The Court: All right. If at the time the briefs are in and I have read them, I desire that the

matter be set down for some further oral arguments, we can do it at that time.

Mr. Blackstone: Yes, that's fine.

The Court: All right, it may be continued, then, to February 15th for submission on thirty, thirty and fifteen. The plaintiff will file the first brief.

Certificate of Reporter

I (We), Official Reporter(s) and Official Reporter(s) pro tem, certify that the foregoing transcript of 23 pages is a true and correct transcript of the matter therein contained as reported by me (us) and thereafter reduced to typewriting, to the best of my (our) ability.

/s/ ELDON M. RICH.

[Endorsed]: Filed January 6, 1955. [23]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District, Southern Division, do Hereby Certify That the Foregoing and Accompanying Documents and Exhibits, Listed Below, Are the Originals Filed in This Court in the Above-Entitled Case and That They Constitute

the Record on Appeal Herein as Designated by the Attorneys for the Appellant:

Complaint to Recover Federal Estate Taxes.

Answer by United States Attorney.

Pre-Trial Order.

Stipulation and Order Admitting Into Evidence and Adding Into Certain Pages to Exhibit 3.

Opinion of Judge.

Findings of Facts and Conclusions of Law.

Judgment.

Notice of Appeal.

Bond for Cost on Appeal.

Appellant's Designation of Record on Appeal.

Reporters Transcript, November 24, 1954.

Joint Exhibits 1, 2, 3 and 4.

In Witness Whereof, I have Hereunto Set My Hand and Affixed the Seal of Said District Court, This 21st day of September, 1955.

[Seal]

C. W. CALBREATH,
Clerk;

By /s/ WM. J. FLINN,
Deputy Clerk.

[Endorsed]: No. 14879. United States Court of Appeals for the Ninth Circuit. Bank of America National Trust and Savings Association, as Executor for the Last Will and Testament of Thomas McDonough, deceased, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed September 21, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 14879

BANK OF AMERICA, NATIONAL TRUST
AND SAVINGS ASSOCIATION, a National
Banking Corporation, as Executor of the Last
Will and Testament of Thomas McDonough,
Deceased,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S STATEMENT OF THE
POINTS ON WHICH IT INTENDS TO
RELY ON THE APPEAL, AND APPEL-
LANT'S DESIGNATION OF THE CON-
TENTS OF THE RECORD ON APPEAL

I.

Statement of the Points on Appeal.

The appellant intends to rely on these points on
appeal:

1. The judgment and decision is against law.
2. The Findings of Fact do not support either
the Conclusions of Law or the Judgment.
3. That portion of Finding 4 reading as follows
is not supported by the evidence, and in fact is
a conclusion of law, and said conclusion of law is
erroneous, to wit:

“The net value of the said jointly-owned property to which Thomas McDonough succeeded by virtue of the death of Peter P. McDonough was \$373,910.01, computed by deducting from the gross estate of Peter P. McDonough the specific legacies, the federal estate taxes, the state inheritance taxes and the deductions in the amounts set forth above.”

4. That portion of Finding 5 reading as follows is not supported by the evidence, and in fact is a conclusion of law, and said conclusion of law is erroneous, to wit:

“This left a net adjusted value of the interest of Thomas McDonough in the jointly-owned property included in the prior estate and included in Thomas McDonough’s estate to which interest Thomas McDonough succeeded on Peter P. McDonough’s death of \$373,894.78.”

5. Failure to find that the amount of property previously taxed within five years received by Thomas McDonough from Peter P. McDonough, which was entitled to be deducted from the gross estate for Federal Estate Tax purposes in the Estate of Thomas McDonough, was the sum of \$577,971.92.

6. Failure to find that in computing the Federal Estate Tax due from the Estate of Thomas McDonough, said estate was entitled either to have the full amount of said jointly-owned property included in the gross estate of said Thomas McDonough with a credit for the amount of the

Federal Estate Tax of \$141,592.71 due and unpaid in the Estate of Peter P. McDonough, with a deduction of said previously taxed property amounting to \$577,971.92; or, in the alternative, to have the gross estate of Thomas McDonough reduced by the said tax of \$141,592.71, and still be entitled to a deduction of \$577,971.92 for the property previously taxed in the Estate of Peter P. McDonough.

7. Failure to find that notwithstanding the form in which the gross estate for Federal Estate Tax purposes was set forth in the estate tax return in the Estate of Thomas McDonough, plaintiff nevertheless was entitled in computing the deduction for property previously taxed in the Estate of Peter P. McDonough to have such computation made in accordance with the Federal Estate Tax provisions, i.e., the applicable law at the full amount of \$577,971.92.

8. That said judgment is against law in that it did not compute the jointly-owned property previously taxed in the Estate of Peter P. McDonough at the full value of \$577,971.92.

9. That said judgment is against law in that it holds that the Federal Estate Tax of \$141,592.71 paid by the Estate of Thomas McDonough upon the joint property left by Peter P. McDonough and due in said Estate of Peter P. McDonough, had to be deducted from said jointly-owned property of \$577,971.92 in computing the deduction in the Estate

of Thomas McDonough for property previously taxed.

10. That said judgment is against law in that it reduced the deduction for property previously taxed in the Estate of Peter P. McDonough by the items set forth in Finding 4.

II.

Designation of Contents of Record on Appeal.

The appellant designates for inclusion the complete record and all the proceedings and evidence in the action to be contained in the Record on Appeal, including the Reporter's Transcript of the evidence or proceedings, and this Designation of Contents of Record on Appeal.

Dated: September 23rd, 1955.

/s/ J. W. RADIL,

/s/ F. J. KILMARTIN,

KNIGHT, BOLAND & RIOR-
DAN,

Attorneys for Appellant.

Receipt of Copy Acknowledged.

[Endorsed]: Filed September 23, 1955.

No. 14893

United States
Court of Appeals
For the Ninth Circuit

GUENITH OPAL BEEDY and CYNTHIA GUEN
BEEDY, by His Next Friend, GUENITH
OPAL BEEDY,

Appellants,

VS.

THE WASHINGTON WATER POWER CO., a
Corporation,

Appellee.

Transcript of Record

Appeal from the United States District Court
for the District of Idaho
Northern Division.

FILED
FEB -8 1956

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

THOMAS B. PAYNE,
205 Gyde Taylor Building,
Wallace, Idaho;

GLENN A. COUGHLAN,
327 Idaho Building,
Boise, Idaho,

Attorneys for Appellants.

McNAUGHTON & SANDERSON,
Wigget Building,
Coeur d'Alene, Idaho;

PAINE, LOWE, COFFIN, ENNIS & HERMAN,
602 Spokane & Eastern Building,
Spokane 1, Washington,

Attorneys for Appellee.

In the District Court of the United States, in and
for the District of Idaho, Northern Division

No. 1999

GUENITH OPAL BEEDY and CYNTHIA
GUEN BEEDY, by His Next Friend, GUEN-
ITH OPAL BEEDY,

Plaintiffs,

vs.

THE WASHINGTON WATER POWER CO., a
Corporation,

Defendant.

COMPLAINT

Plaintiffs complaint of the defendant and for
cause of action allege:

I.

Plaintiffs are residents of the State of Texas and
the defendant is a Corporation incorporated under
the laws of the State of Washington and is author-
ized and licensed and qualified to do business in the
State of Idaho. The matter in controversy herein
exceeds, exclusive of interest and costs, the sum of
\$3,000.00.

II.

That Guenith Opal Beedy is the surviving wife
and Cynthia Guen Beedy is the surviving child of
George D. Beedy.

III.

That the defendant, The Washington Water
Power Company, is a corporation engaged in the
transportation, delivery and sale of electricity for

the City of Wallace, Idaho, and vicinity as well as elsewhere in the United States.

IV.

That the deceased, George D. Beedy, was at all times herein mentioned an employee of the Lewis Construction Company of Great Falls, Montana, who had contracted to change the wires, insulators and crossarms on an electrical transmission line for the defendant.

V.

That on July 1, 1954, at a place approximately two miles northeast of Wallace, Idaho, the deceased, George D. Beedy, while in the course of his employment with the said Lewis Construction Company, was assisting in installing a transmission line across and above a 13,000-volt electrical power line which was then and there owned, operated and energized by the defendant; said transmission line was then and there attached to a winch on a truck and came into contact with the said defendant's 13,000-volt power line which energized the transmission line which in turn carried a deadly charge of electricity to the truck with which deceased was in contact, thereby electrocuting him.

VI.

That the defendant was negligent, careless and reckless, in that (a) prior to crossing the said 13,000-volt line above described, the deceased's employer requested the defendant to cut off the power on said electrical power line so that the crossing by the transmission line could be made in safety and

that the defendant neglected, failed to refused to comply with said request; (b) that the defendant, in violation of its duty at the time and place above mentioned, negligently failed to provide the deceased with a safe place to work; (c) that defendant, with knowledge of the dangerous condition existing in installation of transmission line in close proximity to its power line, failed and neglected to install proper safeguards and take proper precautions to prevent contact with its power line.

VII.

That the said negligence of defendant was the direct proximate cause of the deceased's death.

VIII.

That the plaintiffs were damaged by the loss of their father and husband in the sum of \$200,000.00.

Wherefore, the plaintiffs demand judgment against the defendant, The Washington Water Power Company, in the sum of \$200,000.00 and costs.

/s/ THOMAS PAYNE,

/s/ GLENN A. COUGHLAN,

Attorneys for Plaintiffs.

Plaintiffs herein demand that the above-entitled cause be tried before a jury.

/s/ THOMAS PAYNE,

/s/ GLENN A. COUGHLAN,

Attorneys for Plaintiff.

[Endorsed]: Filed November 26, 1954.

[Title of District Court and Cause.]

MOTION TO STRIKE

Defendant moves the court to strike from the complaint the last part of Paragraph VI, which reads as follows:

(b) "That the defendant, in violation of its duty at the time and the place above mentioned, negligently failed to provide the deceased with a safe place to work;"

(c) "That the defendant, with knowledge of the dangerous condition existing in installation of transmission in close proximity to its power line, failed and neglected to install proper safeguards and take proper precautions to prevent contact with its power line;"

for the reason that said allegations are immaterial.

Dated this 16th day of December, 1954.

McNAUGHTON & SANDERSON,

PAINE, LOWE, COFFIN,

ENNIS & HERMAN,

/s/ W. F. McNAUGHTON,

/s/ HORTON HERMAN,

Attorneys for Defendant.

[Endorsed]: Filed December 16, 1954.

[Title of District Court and Cause.]

MOTION FOR MORE
DEFINITE STATEMENT

Plaintiffs' complaint is so vague and ambiguous the defendant should not be reasonably required to prepare responsive pleading and the defendant, therefore moves the plaintiff be ordered to furnish more definite statement of the nature of their claim as set forth in the complaint in the following respects:

With respect to paragraph VI by stating whether after the deceased's employer requested the defendant to cut off the power on said electrical line:

(a) The defendant neglected after agreeing to cut off said power,

(b) the defendant merely failed to cut off said power after being requested, or

(c) the defendant specifically refused to cut it off.

Dated this 16th day of December, 1954.

McNAUGHTON & SANDERSON,
PAINE, LOWE, COFFIN,
ENNIS & HERMAN,

/s/ W. F. McNAUGHTON,

/s/ HORTON HERMAN,

Attorneys for Defendant.

[Endorsed]: Filed December 16, 1954.

[Title of District Court and Cause.]

MOTION TO DISMISS

And now comes the defendant, The Washington Water Power Co., and moves the court as follows:

I.

To dismiss the action because the complaint fails to state a claim against the defendant upon which relief can be granted.

Dated this 16th day of December, 1954.

McNAUGHTON & SANDERSON,
PAINE, LOWE, COFFIN,
ENNIS & HERMAN,

/s/ W. F. McNAUGHTON,

/s/ HORTON HERMAN,

Attorneys for Defendant.

[Endorsed]: Filed December 16, 1954.

[Title of District Court and Cause.]

INTERROGATORIES BY PLAINTIFFS

To Virgil Thompson, Local Manager, Washington Water Power Company, Wallace, Idaho:

You are hereby notified to answer under oath the interrogatories, numbered 1 to 15, as shown below, within 15 days of the time service is made upon

you, in accordance with Rule 33 of Federal Rules of Civil Procedure.

1. What is your occupation?
2. What is your residence?
3. How long have you resided there?
4. How long have you been so employed?
5. Were you on the premises of the work being done for your company by Lewis Construction Company of Great Falls, Montana, on the transmission line from Government Gulch Substation to Burke Substation in Idaho?
6. How often were you on the premises and on what dates?
7. Are you acquainted with Mr. Ed Raunig?
8. Were you contacted by him with respect to killing the hot lines over which crossings were being made by the Lewis Construction Company?
9. How many occasions?
10. What action did you take in respect to this request?
11. Did you ever make a request or order to anyone to kill the power lines owned by defendant over which, and during the time, Lewis Construction Company was installing transmission from Government Gulch Substation to Burke Substation?
12. Do you know who shut off the power on the Nine Mile Gulch line on July 11, 1954?
13. Who owns this line?
14. How long was the power off?
15. Was power subsequently cut off defendant's

lines over which Lewis Construction Company was making crossings subsequent to July 11, 1954?

Dated January 27, 1955.

/s/ THOMAS PAYNE,

/s/ GLENN A. COUGHLAN,
Attorneys for Plaintiffs.

[Endorsed]: Filed January 29, 1955.

[Title of District Court and Cause.]

ANSWER TO INTERROGATORIES
TO VIRGIL THOMPSON

Interrogatory No. 1.

District Manager, Coeur d'Alene Mining
District, Washington Water Power Company.

Interrogatory No. 2.

Silverton, Idaho.

Interrogatory No. 3.

Seventeen (17) months.

Interrogatory No. 4.

Twenty-two (22) months.

Interrogatory No. 5.

I was there from time to time because I was interested in the job, but I had no direct supervisory control over the operation. I was not on the premises or in the area at the time of the accident involved in this litigation.

Interrogatory No. 6.

I made no record of the exact times or dates that I was there. I would estimate that I saw the job or was in the neighborhood of the job on an average of two (2) times a week.

Interrogatory No. 7.

Yes.

Interrogatory No. 8.

I sat in on a conference in which it was determined which crossings could be killed and which had to be worked hot, early in the job. I don't recall ever being directly contacted by Mr. Raunig with respect to killing any specific lines.

Interrogatory No. 9.

I only remember the one conference referred to in the answer to the question above until the time approximately two (2) weeks after the accident, at which time Mr. Hammar, inspector for the company, contacted me with respect to a particular crossing. This was with reference to crossings on the Wallace to Burke section of the line.

Interrogatory No. 10.

I don't recall any specific request being made.

Interrogatory No. 11.

Yes; I issued orders to kill the crossings which it had been agreed would be de-energized.

lines over which Lewis Construction Company was making crossings subsequent to July 11, 1954?

Dated January 27, 1955.

/s/ THOMAS PAYNE,

/s/ GLENN A. COUGHLAN,
Attorneys for Plaintiffs.

[Endorsed]: Filed January 29, 1955.

[Title of District Court and Cause.]

ANSWER TO INTERROGATORIES
TO VIRGIL THOMPSON

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District Manager, Coeur d'Alene Mining
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Interrogatory No. 10.

I don't recall any specific request being made.

Interrogatory No. 11.

Yes; I issued orders to kill the crossings which it had been agreed would be de-energized.

Interrogatory No. 12.

No one shut off the power on this date. When a short circuit occurred on the line, the automatic circuit-breaker opened automatically, and the line was off for a period of about one hour.

Interrogatory No. 13.

The Washington Water Power Company.

Interrogatory No. 14.

Approximately one (1) hour and five (5) minutes.

Interrogatory No. 15.

To the best of my recollection, we de-energized one feeder of our own subsequent to the accident, and lines owned by other utilities were de-energized subsequent to the accident.

/s/ VIRGIL THOMPSON.

Duly verified.

[Endorsed]: Filed February 14, 1955.

[Title of District Court and Cause.]

INTERROGATORIES BY PLAINTIFFS

To the Washington Water Company and J. E. Royer, Vice President:

You are hereby notified to answer under oath the interrogatories, numbered 1 to 30, as shown below, within 15 days of the time service is made upon you,

in accordance with Rule 33 of Federal Rules of Civil Procedure.

1. Did defendant, in April, 1954, have a contract with Lewis Construction Company of Great Falls, Montana, for work on your transmission line from the Washington Water Power Company Substation at Government Gulch to the Substation at Burke, Idaho?

2. Do you have a plan or plat showing the electrical transmission line of the defendant Company for the Wallace, Idaho, area, including the lines being worked on on July 11, 1954, and including the power line running up Nine Mile Gulch? If so, please attach a copy.

3. Who services, repairs and maintains the electrical power lines which you own in the Wallace, Idaho, area?

4. Are you cognizant of the provisions of the National Electric Safety Code?

5. Are you cognizant of the provisions of the Idaho Minimum General Safety Standards and Practices for Outdoor construction, operation and maintenance of electrical wires and equipment?

6. Does the defendant employ safety engineers?

7. If answer to the preceding question is in the affirmative, please state whether or not inspections by your safety engineers were made of the premises and work being done by Lewis Construction Com-

pany for defendant on the Government Gulch to Burke Substation Contract.

8. Please give names of safety engineers, dates and times of such inspections.

9. What safety precautions and procedures do you recommend when installing transmission lines across electrically energized power lines?

10. Did any of defendant's employees, agents, representatives or inspectors inspect the work on the line from Government Gulch Substation to Burke Substation as it was being performed?

11. Please state their position, names and addresses.

12. Were any of the agents, employees or officers of your company upon the premises where the accident occurred on July 11, 1954?

13. Is Sam Hammar in defendant's employ?

14. What is his position with defendant?

15. What connection, if any, did he have with the work being done by the Lewis Construction Company for defendant?

16. (a) Is Virgil Thompson employed by you?

(b) What is his position?

17. Do you own the electrical power line running up Nine Mile Gulch?

18. Do you energize this line?

19. What is the voltage of this line?

20. (a) Was the power cut off the Nine Mile Gulch line on July 11, 1954?

(b) If this power was cut off, at whose request?

(c) And who actually cut off the power?

(d) How long was the power off on this date?

21. Did defendant subsequently cut off the power at any other times on other of your lines when crossings were made by the Lewis Construction Company?

22. How many times?

23. When were you first notified that George Beedy was involved in the accident referred to in plaintiffs' complaint?

24. State the names and addresses of all persons having knowledge of the relevant facts of the injury to and the death of George Beedy whom you or your agents or representatives have interviewed.

25. Please furnish a copy of any and all written reports or documents you have made or received or have in your files concerning the accident of July 11, 1954, wherein George Beedy was killed.

26. Did your investigation reveal that the transmission line, being sagged by Lewis Construction Company on July 11, 1954, came into contact with a power line energized by the defendant?

27. What did your investigation reveal as to the proximate cause of George Beedy's death?

28. Was defendant or any of its agents or employees or representatives requested to cut off the electrical power on lines owned by it where crossings were made by the Lewis Construction Company?

29. If so, who made these requests?

30. What action was taken in respect to the request?

Dated January 27, 1955.

THOMAS PAYNE,

GLENN A. COUGHLAN,

/s/ THOMAS PAYNE,

/s/ GLENN A. COUGHLAN,

Attorneys for Plaintiffs.

[Endorsed]: Filed January 29, 1955.

[Title of District Court and Cause.]

ANSWER TO INTERROGATORIES TO THE
WASHINGTON WATER POWER COM-
PANY AND J. E. ROYER, VICE-PRESI-
DENT

Interrogatory No. 1.

Yes.

Interrogatory No. 2.

Yes. Copy is attached.

Interrogatory No. 3.

The Washington Water Power Company.

Interrogatory No. 4.

Yes.

Interrogatory No. 5.

Yes.

Interrogatory No. 6.

The Company employs a safety supervisor but no safety engineers as such.

Interrogatory No. 7.

The work was being done by an independent contractor who was completely responsible for methods of operation. The company made no safety inspections in connection with the work. Under our contract with the Lewis Construction Company, we had no control over their method of operation and no supervision over the contractor's personnel.

Interrogatory No. 8.

The question is inapplicable to the situation.

Interrogatory No. 9.

When work is being done under contracts such as this, the Company makes no recommendations as to safety precautions and procedures. When constructing lines on our own behalf, we employ adequate safeguards and structures to insure the safety of our personnel.

Interrogatory No. 10.

The Company had an inspector on the job whose duties were to inspect the work as it was

completed to insure that it met the specifications of the contract.

Interrogatory No. 11.

Sam J. Hammar, 1718 West Kiernan Avenue, Spokane, Wash. Position: Associate electrical engineer.

Glenn R. George, South 2822 Lincoln St., Spokane, Wash. Position: Construction engineer.

Interrogatory No. 12.

One of the Company's employees, Louis Clary, went to the neighborhood of the accident after the accident occurred and cleared the circuits and put them back in operation, but none was present at the time of the accident.

Interrogatory No. 13.

Yes.

Interrogatory No. 14.

Associate electrical engineer.

Interrogatory No. 15.

He was the inspector on the job who inspected the work as it was being completed to determine that it met the specifications called for in the contract.

Interrogatory No. 16.

(a) Yes.

(b) District Manager, Coeur d'Alene Mining District, at Wallace, Idaho.

Interrogatory No. 17.

Yes.

Interrogatory No. 18.

Yes.

Interrogatory No. 19.

Thirteen thousand (13,000) volts.

Interrogatory No. 20.

(a) It was automatically cut off when there was a short circuit on the line.

(b) It was automatically cut off. No one cut it off.

(c) Automatic switch.

(d) Approximately one (1) hour and five (5) minutes.

Interrogatory No. 21.

Yes.

Interrogatory No. 22.

At one crossing between Wallace and Gem on the Wallace-Burke section. The power was actually cut off twice on two different occasions at this particular crossing.

Interrogatory No. 23.

A representative of the Company was informed of this fact on July 12, 1954.

Interrogatory No. 24.

Ed F. Raunig, Great Falls, Montana; Dr. H. E. Bonebrake, Wallace, Idaho; Glenn R. George, S. 2822 Lincoln St., Spokane, Wash.; Virgil Thompson, Silverton, Idaho; Sam J. Hammar, West 1718 Kiernan Ave., Spokane, Wash., and Lewis Gardner, Sheriff, Wallace, Idaho.

Interrogatory No. 25.

Copy of report attached.

Interrogatory No. 26.

Yes.

Interrogatory No. 27.

It indicated that he was in contact with a truck which became energized when the transmission line that was being sagged by The Lewis Construction Company came in contact with a 13,000-volt feeder line owned by The Washington Water Power Company.

Interrogatory No. 28.

No; no specific requests were made. It was understood when the job began that all crossings were to be made hot. Later on, discussion was had of the possibility of de-energizing some lines. We are not certain whether The Washington Water Power Company or The Lewis Construction Company initiated the discussion. As a result of a conference, it was agreed that certain lines would be de-energized. We don't have any record of any specific bequest having been made.

Interrogatory No. 29.

No requests made.

Interrogatory No. 30.

No requests made.

/s/ J. E. ROYER.

Duly verified.

(Copy)

Report of Public Accident
Washington Water Power Company

Date of accident: July 11, 1954—1:15 p.m.

City or Town: Wallace, Idaho.

Name and address of person injured or owner of property damaged: George Beedy, Gem, Idaho; Jack Inman, Spokane, Washington; Don Carey, Great Falls, Montana.

Explain in detail nature of accident: The line crew of the Lewis Construction Company of Great Falls, Montana, was at work reconductoring Coeur d'Alene No. 3 High Line between Silverton, Idaho, and Nine Mile Canyon. One conductor slacked in to the 13 kv Nine Mile Feeder killing George Beedy, and burning Jack Inman on the hand and shoulder, who were leaning against the truck pulling the conductor. Don Carey was burned on the fingers while working on a pole structure.

Name and address of all witnesses: Employees of the Lewis Construction Company.

Extent of injury or damage to—Person: George Beedy, killed. Jack Inman, burned on the hand and shoulder. Don Carey, burned on the fingers.

Date Reported: July 14, 1954.

Reported by: /s/ Stanley Gibson, for District Manager.

[Endorsed]: Filed February 14, 1955.

[Title of District Court and Cause.]

MINUTES OF FEB. 15, 1955

This cause came on regularly in open court for hearing on defendant's Motion to Dismiss, Motion for More Definite Statement and Motion to Strike, Glenn Coughlan appearing for plaintiffs and Alan P. O'Kelly appearing for the defendant.

The motion for More Definite Statement was overruled and counsel ordered to get the information desired under the rules of discovery. The Motion to Strike was overruled without prejudice to renewal at the time of trial of the case on its merits. The Motion to Dismiss was taken under advisement. Plaintiff having filed brief, the defendant was given 7 days to file a reply brief and plaintiff 5 days to reply to reply brief.

[Title of District Court and Cause.]

ORDER

This matter is before the Court at this time on Defendant's Motion to Dismiss. Oral argument has been presented, counsel have submitted written briefs, and the Court has fully considered the same.

It is agreed in this case that it would be proper to grant this motion if the defendant, Washington Water Power, was an employer of the plaintiffs' decedent within the Workmen's Compensation Act. I.C. 72-1010, which would bar a suit against

the employer. *Moon vs. Erwin*, 64 Idaho, 464, states that: "The essential element of the relationship of 'employer and employee' is the right of control. Also,

"Under the provisions of the statute quoted, the true test is, Did the work being done pertain to the business, trade, or occupation of the defendant, carried on by it for pecuniary gain? If so, the fact that it was being done through the medium of an independent contractor would not relieve the defendant from liability." *Gifford vs. Nottingham*, 68 Idaho, 320, 193 Pac. 2d 831, citing *O'Boyle vs. Parker Young Co.*, 95 Vt., 58, 112 A. 385.

It appears to the Court at this time that there is no evidence in the record to determine these tests, and that these can only be determined on presentation of the case on its merits.

For these reasons, It Is Ordered that the Motion to Dismiss be, and the same is, hereby Denied without prejudice to raising these same objections and questions at the time of the trial of this case on the merits.

And it is so Ordered.

Dated this 6th day of April, 1955.

/s/ CHASE A. CLARK,
Chief Judge, United States District Court, District
of Idaho.

[Endorsed]: Filed April 6, 1955.

[Title of District Court and Cause.]

ANSWER

Defendant, in answer to plaintiff's Complaint, admits, denies and alleges as follows:

First Defense

I.

Admits that defendant is a corporation incorporated under the laws of the State of Washington and is authorized, licensed and qualified to do business in the State of Idaho, and that the matter in controversy herein exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars (\$3,000), and denies that it has any knowledge or information sufficient to form a belief as to the remaining allegations in Paragraphs I and II of plaintiffs' Complaint.

II.

Admits the allegations set forth in Paragraphs III, IV and V of plaintiffs' Complaint.

III.

Denies each and every allegation, matter and thing set forth in Paragraphs VI, VII and VIII of plaintiffs' Complaint, and specifically denies that plaintiffs are damaged in the sum of Two Hundred Thousand Dollars (\$200,000) or in any other amount.

Second Defense

For further, separate and affirmative defense to the Complaint herein, defendant alleges:

I.

That at the time the said deceased, George D. Beedy, was electrocuted as alleged in plaintiffs' Complaint, he was employed by the Lewis Construction Company, an independent contractor acting for and on behalf of defendant, which work being done by said independent contractor pertained to the business, trade or occupation of the defendant, carried on by it for pecuniary gain; and, under the terms of Idaho Code, § 72-1010, defendant was the employer of the said George D. Beedy for the purposes of the Idaho Workmen's Compensation Act; and, under § 72-203 of the Idaho Code, the rights and remedies of plaintiffs under the Idaho Workmen's Compensation Law are exclusive, and plaintiffs have claimed and received compensation under the Idaho Workmen's Compensation Law.

Third Defense

For further, separate and affirmative defense to the Complaint herein, defendant alleges:

I.

That any injuries sustained or suffered by the said George D. Beedy resulting in his death at the time and place and occasion mentioned in the Complaint were caused in whole or in part or were contributed to by the negligence or fault or want of care of the said George D. Beedy and not by any fault, negligence or want of care on the part of this defendant.

[Title of District Court and Cause.]

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Defendant, in answer to plaintiff's Complaint, admits, denies and alleges as follows:

First Defense

I.

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II.

Admits the allegations set forth in Paragraphs III, IV and V of plaintiffs' Complaint.

III.

Denies each and every allegation, matter and thing set forth in Paragraphs VI, VII and VIII of plaintiffs' Complaint, and specifically denies that plaintiffs are damaged in the sum of Two Hundred Thousand Dollars (\$200,000) or in any other amount.

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I.

That at the time the said deceased, George D. Beedy, was electrocuted as alleged in plaintiffs' Complaint, he was employed by the Lewis Construction Company, an independent contractor acting for and on behalf of defendant, which work being done by said independent contractor pertained to the business, trade or occupation of the defendant, carried on by it for pecuniary gain; and, under the terms of Idaho Code, § 72-1010, defendant was the employer of the said George D. Beedy for the purposes of the Idaho Workmen's Compensation Act; and, under § 72-203 of the Idaho Code, the rights and remedies of plaintiffs under the Idaho Workmen's Compensation Law are exclusive, and plaintiffs have claimed and received compensation under the Idaho Workmen's Compensation Law.

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I.

That any injuries sustained or suffered by the said George D. Beedy resulting in his death at the time and place and occasion mentioned in the Complaint were caused in whole or in part or were contributed to by the negligence or fault or want of care of the said George D. Beedy and not by any fault, negligence or want of care on the part of this defendant.

Fourth Defense

For further, separate and affirmative defense to the Complaint herein, defendant alleges:

I.

That the employment of plaintiffs' decedent had certain risks incident thereto which were obvious and well known to plaintiffs' decedent at all the times of his employment, and also when he first entered thereon, and those risks were assumed by him and whatever injuries plaintiffs' decedent received, which resulted in his death, arose from and were caused by those risks thus assumed by him.

Wherefore, having fully answered, defendant prays that plaintiffs' Complaint be dismissed with prejudice, and that defendant may have and recover its costs and disbursements from plaintiffs.

McNAUGHTON & SANDERSON,
PAINE, LOWE, COFFIN,
ENNIS & HERMAN,

/s/ ALAN S. PAINE,

/s/ ALAN P. O'KELLY,

Attorneys for Defendant.

[Endorsed]: Filed April 15, 1955.

[Title of District Court and Cause.]

MINUTES OF MAY 16, 1955

The Court being fully advised in this matter, and good cause appearing, it was ordered that the setting of this matter be vacated to a later date.

[Title of District Court and Cause.]

MOTION FOR SUMMARY JUDGMENT

The defendant, The Washington Water Power Company, by McNaughton & Sanderson, and Paine, Lowe, Coffin, Ennis & Herman, its attorneys, hereby moves the Court to enter a summary judgment for the defendant in accordance with the provisions of Rule 56 (b) and (c) of the Rules of Civil Procedure on the ground that the pleadings, affidavits of B. J. Lindsay, Lester R. Gamble, J. Fletcher Emery, Thomas A. Purton, R. E. Forman and Virgil Thompson thereto attached, and the depositions of Ed F. Raunig, Ruben Liddell Brown and Jack P. Inman on file herein, show that defendant is entitled to judgment as a matter of law.

Dated this 1st day of July, 1955.

McNAUGHTON & SANDERSON,
PAINE, LOWE, COFFIN,
ENNIS & HERMAN,

/s/ ALAN P. O'KELLY,
Attorneys for the Defendant.

To: Thomas B. Payne and Glenn A. Coughlan, Attorneys for Plaintiff:

Please Take Notice that defendant will bring on for hearing the above Motion for Summary Judgment on the 15th day of July, 1955, or as soon thereafter as the above matter can be heard.

Dated this 1st day of July, 1955.

McNAUGHTON & SANDERSON,
PAINE, LOWE, COFFIN,
ENNIS & HERMAN,

/s/ ALAN P. O'KELLY,
Attorneys for the Defendant.

AFFIDAVIT OF B. J. LINDSAY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

State of Washington,
County of Spokane—ss.

B. J. Lindsay, being first duly sworn, deposes and says: That I am Secretary of The Washington Water Power Company and am the official custodian of the business records of The Washington Water Power Company.

This Affidavit is submitted in support of defendant's Motion for Summary Judgment herein for the purpose of showing that there is in this action no genuine issue as to any material fact and that

defendant is entitled to judgment as a matter of law.

That attached hereto, marked Exhibit "A" and made a part hereof, is a true and correct copy of a Contract entered into the 27th day of April, 1954, by and between Lewis Construction Company and The Washington Water Power Company as it appears in the original records of The Washington Water Power Company; that attached hereto, marked Exhibit "B" and made a part hereof, is a true and correct copy of Standard General Conditions for Engineering Construction, copyright 1925, by the Joint Conference on Standard Construction Contracts, which is referred to and made a part of said Agreement of April 27, 1954, by reference in Article VII of said Agreement.

That the records of the Company show that George Beedy and the crew with which he was working at the time of the injury resulting in his death, were performing their work on a private right-of-way easement owned by The Washington Water Power Company.

/s/ B. J. LINDSAY.

Subscribed and Sworn to before me this 30th day of June, 1955.

[Seal] /s/ ALAN P. O'KELLY,
Notary Public in and for the State of Washington,
Residing at Spokane.

EXHIBIT A

AGREEMENT

This Agreement, made the 27th day of April, in the year Nineteen Hundred and Fifty-four by and between Lewis Construction Company, hereinafter called the Contractor, and The Washington Water Power Company, hereinafter called the Owner,

Witnesseth, that the Contractor and the Owner for the considerations hereinafter named agree as follows:

Article I. Scope of Work

The Contractor shall furnish all of the equipment and perform all of the work shown on the drawings and described in the specifications, entitled:

Coeur d'Alene No. 3 Transmission Line—
Replace conductors from the Washington Water Power Company substation at Government Gulch to the substation at Burke, all in the state of Idaho, a distance of about 22.33 miles.

This work shall include:

1. Replace present arms that are in poor condition.
2. Remove overhead ground wires on those portions of the line where they now exist.
3. Replace all Hewlett type insulators with ball and socket type insulators.

4. Replace present 7 strand #8 and 7 strand #7 copper conductors with 397,500 c.m. A.C.S.R. conductors.

5. Replace guys or anchors or both where these have deteriorated to the extent that they can no longer withstand the loads imposed on them.

The Owner will supply the line materials and these will be stockpiled at Wallace, Idaho.

After the Contractor has taken the materials from the warehouse, he shall be responsible for their condition, loss and breakage. The Contractor shall do everything required by this Agreement, the General Conditions of the Contract, the Specifications and the Drawings.

Article II. Time of Completion

The work to be performed under this contract shall be commenced not later than May 3, 1954, and shall be completed, ready for service, not later than July 15, 1954. Cleanup work with the line energized may extend to August 13, 1954.

Article III. The Contract Sum

The Owner shall pay the Contractor for the performance of the contract subject to the additions and deductions therein, in current funds as follows:

Item	Approx.		Unit Price	Price
	No.			
1. Install new poles	2	\$ 75.00	\$ 150.00	
2. Install single 9 or 11 ft. arms	10	20.00	200.00	
3. Install single 22 ft. arms	100	30.00	3,000.00	
4. Install double 22 ft. arms	90	40.00	3,600.00	
5. Install anchors	50	20.00	1,000.00	
6. Install down guys	100	12.00	1,200.00	
7. Install new string insulators	480	7.00	3,360.00	
8. Install new clamp to present insulators and insulators to new arms	400	3.00	1,200.00	
9. String new conductor with armor rods—miles	22.33	1,000.00	22,330.00	
Total Installation Cost				\$36,040.00
10. Remove poles	2	25.00	50.00	
11. Remove 9 or 11 ft. arms	10	5.00	50.00	
12. Remove 22 ft. single arms	100	10.00	1,000.00	
13. Remove 22 ft. double arms	90	15.00	1,350.00	
14. Remove down guys	100	8.00	800.00	
15. Remove string insulators	480	5.00	2,400.00	
16. Remove present conductors— miles	22.33	500.00	11,165.00	
17. Remove overhead grnd wire— miles	8.00	200.00	1,600.00	
Total Removal Cost				\$18,415.00
Total Cost				\$54,455.00

In the event that the number of any item is increased or decreased, the unit prices shall apply and the total contract bid will be adjusted accordingly.

Any additional items of work not specified above but designated by the Company representative shall be paid on the basis of actual payroll labor for the work plus 38 per cent for overheads and equipment, plus 10 per cent of the total for profit.

On structures, such as the Type "O" where 22 foot arms must be cut to a shorter length, the unit price for 22 foot arms will be used.

Where the quantities originally contemplated are so changed that application of the agreed unit price to the quantity of work performed is shown to create a hardship to the Owner or the Contractor, there shall be an equitable adjustment of the contract to prevent such hardship.

Article IV. Progress Payments

The Owner shall make payments on account of the contract as provided therein, as follows:

On or about the seventh (7th) day of each month ninety (90) per cent of the value, based on the unit prices shown in the contract for labor and materials incorporated in the work and of materials suitably stored at the site thereof up to the first day of that month, as estimated by the Engineer, less the aggregate of previous payments.

Article V. Acceptance and Final Payment

Upon receipt of written notice that the work is ready for final inspection and acceptance, the Engineer shall promptly make such inspection and when he finds the work acceptable under the contract and the contract fully performed, he shall promptly issue a certificate, over his own signature, stating that the work provided for in this contract has been completed and is accepted by him

under the terms and conditions thereof, and the entire balance found to be due to the Contractor, including the retained percentage, shall be paid to the Contractor at the office of the Owner within seven (7) days after the date of said final certificate.

Before issuance of final certificate, the Contractor shall submit evidence satisfactory to the Engineer that all payrolls, material bills, and other indebtedness connected with the work have been paid.

The making and acceptance of the final payment shall constitute a waiver of all claims by the Owner, other than those arising from unsettled liens, from faulty work appearing after the final payment or from requirement of the Specifications and of all claims by the Contractor, except those previously made and still unsettled.

If after the work has been substantially completed, full completion thereof is materially delayed through no fault of the Contractor, and the Engineer so certifies, the Owner shall, upon certificate of the Engineer, and without terminating the contract, make payment of the balance due for the portion of the work fully completed and accepted. Such payment shall be made under the terms and conditions governing final payment, except that it shall not constitute a waiver of claims.

Article VI.

Insurance and Guaranty Bond Requirements

The Contractor shall provide insurance and guaranty bond as stated in Articles 27, 28, 29 and 30 of

the General Conditions for not less than the following amounts:

Public Liability	\$100,000-\$200,000
Property Damage	50,000- 100,000
Automobile Property Damage	5,000
Automobile Public Liability..	50,000- 100,000
Guaranty Bond—One Hundred Per Cent (100%) of Total Contract Bid.	

Article VII. The Contract Documents

Standard General Conditions for Engineering Construction, Copyright, 1925, by the Joint Conference on Standard Construction Contract, the Specifications and the Drawings, together with this Agreement, form the Contract, and they are as fully a part of the contract as if hereto attached or herein repeated.

Under Article 20 of the General Conditions, the time for giving notice of suspension shall be ten (10) days and the time within which notice of resumption must be given shall be thirty (30) days.

The following is an enumeration of the Specifications and Drawings:

Couer d'Alene No. 3 Transmission Line—Replace conductors—Specifications.

Plan and Profile Maps of the Line, Dwgs. E-1682, E-1683, E-1684 and E-2530 to E-2538.

Structure Drawings B-610, C-703, G-1665, G-1895, to G-1898, G-3650 and G-3656.

In Witness Whereof the parties hereto have executed this Agreement, the day and year first above written.

LEWIS CONSTRUCTION
COMPANY,
Contractor.

By /s/ ED. F. RAUNIG,
THE WASHINGTON WATER
POWER COMPANY,

By /s/ J. E. E. ROYER,
Vice President.

O.K.:

/s/ H. W. COFFIN,

/s/ LESTER R. GAMBLE.

Attest:

/s/ J. W. WILLIS,

Asst. Secretary.

(Seal).

EXHIBIT B

Standard General Conditions for
Engineering Construction
(Not designed for use in Building Construction)

Copyright 1925 by the Joint Conference on
Standard Construction Contracts

Insofar as matter contained herein is copyrighted by
The American Institute of Architects, the re-
print thereof is by permission of said Ameri-
can Institute of Architects.

Index to the Articles of the General Conditions

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3. Detail Drawings and Instructions.
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Art. 1. Definitions

(a) The Contract Documents consist of the Agreement, the General Conditions of the Contract, the Drawings and Specifications, including all modifications thereof incorporated in the documents before their execution. These form the Contract.

(b) The Owner, the Contractor and the Engineer are those mentioned as such in the Agreement. They are treated throughout the Contract Documents as if each were of the singular number and masculine gender.

(c) Wherever in this Contract the word Engineer is used it shall be understood as referring to the Engineer of the Owner, acting personally or through an assistant duly authorized in writing for such act by the Engineer.

(d) Written notice shall be deemed to have been duly served if delivered in person to the individual or to a member of the firm or to an officer of the corporation for whom it is intended, or if delivered at or sent by registered mail to the last business address known to him who gives the notice.

(e) The term Subcontractor, as employed herein, includes only those having a direct contract with the Contractor and it includes one who furnishes material worked to a special design according to the plans or specifications of this work, but does not include one who merely furnishes material not so worked.

(f) The term "work" of the Contractor or Subcontractor includes labor or materials or both, equipment, transportation, or other facilities necessary to complete the Contract.

(g) All time limits stated in the Contract Documents are of the essence of the Contract.

Art. 2. Execution, Correlation and Intent of Documents

The Contract Documents shall be signed in duplicate by the Owner and the Contractor. In case the Owner and the Contractor fail to sign the General Conditions, Drawings or Specifications, the Engineer shall identify them.

The Contract Documents are complementary, and what is called for by any one shall be as binding as if called for by all. The intention of the documents

is to include all labor and materials, equipment and transportation necessary for the proper execution of the work. It is not intended, however, that materials or work not covered by or properly inferable from any heading, branch, class or trade of the specifications shall be supplied unless distinctly so noted on the drawings. Materials or work described in words which so applied have a well-known technical or trade meaning shall be held to refer to such recognized standards.

Art. 3. Detail Drawings and Instructions

The Engineer shall furnish with reasonable promptness, additional instructions, by means of drawings or otherwise, necessary for the proper execution of the work. All such drawings and instructions shall be consistent with the Contract Documents, true developments thereof, and reasonably inferable therefrom.

Art. 4. Copies of Drawings Furnished

Unless otherwise provided in the Contract Documents the Engineer will furnish to the Contractor, free of charge, all copies of drawings and specifications reasonably necessary for the execution of the work.

Art. 5. Order of Completion

The Contractor shall submit at such times as may be requested by the Engineer, schedules which shall show the order in which the Contractor proposes to carry on the work with dates at which the Contrac-

tor will start the several parts of the work and estimated dates of completion of the several parts.

Art. 6. Drawings and Specifications on the Work

The Contractor shall keep one copy of all drawings and specifications on the work, in good order, available to the Engineer and to his representatives.

Art. 7. Ownership of Drawings

All drawings, specifications and copies thereof furnished by the Engineer are his property. They are not to be used on other work and, with the exception of the signed Contract set, are to be returned to him on request, at the completion of the work. All models are the property of the Owner.

Art. 8. Contractor's Understanding

It is understood and agreed that the Contractor has, by careful examination, satisfied himself as to the nature and location of the work, the conformation of the ground, the character, quality and quantity of the materials to be encountered, the character of equipment and facilities needed preliminary to and during the prosecution of the work, the general and local conditions and all other matters which can in any way affect the work under this Contract. No verbal agreement or conversation with any officer, agent or employe of the Owner, either before or after the execution of this contract, shall affect or modify any of the terms or obligations herein contained.

Art. 9. Materials, Appliances, Employees

Unless otherwise stipulated, the Contractor shall provide and pay for all materials, labor, water, tools, equipment light, power, transportation and other facilities necessary for the execution and completion of the work.

Unless otherwise specified, all materials shall be new and both workmanship and materials shall be of a good quality. The Contractor shall, if required, furnish satisfactory evidence as to the kind and quality of materials.

The Contractor shall at all times enforce strict discipline and good order among his employees, and shall not employ on the work any unfit person or anyone not skilled in the work assigned to him.

Art. 10. Royalties and Patents

The Contractor shall pay all royalties and license fees. He shall defend all suits or claims for infringement of any patent rights and shall save the Owner harmless from loss on account thereof, except that the Owner shall be responsible for all such loss when a particular process or the product of a particular manufacturer or manufacturers is specified, but if the Contractor has information that the process or article specified is an infringement of a patent he shall be responsible for such loss unless he promptly gives such information to the Engineer.

Art. 11. Surveys, Permits and Regulations

The Owner shall furnish all surveys unless otherwise specified. Permits and licenses of a temporary

nature necessary for the prosecution of the work shall be secured and paid for by the Contractor. Permits, licenses and easements for permanent structures or permanent changes in existing facilities shall be secured and paid for by the Owner, unless otherwise specified.

The Contractor shall give all notices and comply with all laws, ordinances, rules and regulations bearing on the conduct of the work as drawn and specified. If the Contractor observes that the drawings and specifications are at variance therewith, he shall promptly notify the Engineer in writing, and any necessary changes shall be adjusted as provided in the Contract for changes in the work. If the Contractor performs any work knowing it to be contrary to such laws, ordinances, rules and regulations, and without such notice to the Engineer, he shall bear all costs arising therefrom.

Art. 12. Protection of Work and Property

The Contractor shall continuously maintain adequate protection of all his work from damage and shall protect the Owner's property from injury or loss arising in connection with this Contract. He shall make good any such damage, injury or loss, except such as may be directly due to errors in the Contract Documents or caused by agents or employees of the Owner. He shall adequately protect adjacent property as provided by law and the Contract Documents. He shall provide and maintain all passageways, guard fences, lights and other fa-

cilities for protection required by public authority or local conditions.

In an emergency affecting the safety of life or of the work or of adjoining property, the Contractor, without special instruction or authorization from the Engineer, is hereby permitted to act, at his discretion, to prevent such threatened loss or injury, and he shall so act, without appeal, if so instructed or authorized. Any compensation, claimed by the Contractor on account of emergency work, shall be determined by agreement or arbitration.

Art. 13. Inspection of Work

The Engineer and his representatives shall at all times have access to the work wherever it is in preparation or progress and the Contractor shall provide proper facilities for such access and for inspection.

If the specifications, the Engineer's instructions, laws, ordinances or any public authority require any work to be specially tested or approved, the Contractor shall give the Engineer timely notice of its readiness for inspection, and if the inspection is by another authority than the Engineer, of the date fixed for such inspection. Inspections by the Engineer shall be promptly made, and where practicable at the source of supply. If any work should be covered up without approval or consent of the Engineer, it must, if required by the Engineer, be uncovered for examination at the Contractor's expense.

Re-examination of questioned work may be ordered by the Engineer and if so ordered the work must be uncovered by the Contractor. If such work be found in accordance with the Contract Documents the Owner shall pay the cost of re-examination and replacement. If such work be found not in accordance with the Contract Documents the Contractor shall pay such cost, unless he shall show that the defect in the work was caused by another Contractor, and in that event the Owner shall pay such cost.

Art. 14. Superintendence: Supervision

The Contractor shall keep on his work during its progress a competent superintendent and any necessary assistants, all satisfactory to the Engineer. The superintendent shall not be changed except with the consent of the Engineer, unless the superintendent proves to be unsatisfactory to the Contractor and ceases to be in his employ. The superintendent shall represent the Contractor in his absence and all directions given to him shall be as binding as if given to the Contractor. Important directions shall be confirmed in writing to the Contractor. Other directions shall be so confirmed on written request in each case. The Contractor shall give efficient supervision to the work, using his best skill and attention.

If the Contractor, in the course of the work, finds any discrepancy between the drawings and the physical conditions of the locality, or any errors or omis-

sions in drawings or in the layout as given by points and instructions, it shall be his duty to immediately inform the Engineer, in writing, and the Engineer shall promptly verify the same. Any work done after such discovery, until authorized, will be done at the Contractor's risk.

Neither party shall employ or hire any employee of the other party without his consent.

Art. 15. Changes in the Work

The Owner, without invalidating the Contract, may order extra work or make changes by altering, adding to or deducting from the work, the Contract Sum being adjusted accordingly. All such work shall be executed under the conditions of the original Contract except that any claim for extension of time caused thereby shall be adjusted at the time of ordering such change.

In giving instructions, the Engineer shall have authority to make minor changes in the work, not involving extra cost, and not inconsistent with the purposes of the work, but otherwise, except in an emergency endangering life or property, no extra work or change shall be made unless in pursuance of a written order by the Engineer, and no claim for an addition to the contract sum shall be valid unless so ordered.

The value of any such extra work or change shall be determined in one or more of the following ways:

- (a) By estimate and acceptance in a lump sum.
- (b) By unit prices named in the contract or subsequently agreed upon.
- (c) By cost and percentage or by cost and a fixed fee.

If none of the above methods is agreed upon, the Contractor, provided he receives an order as above, shall proceed with the work. In such case and also under case (c), he shall keep and present in such form as the Engineer may direct, a correct account of the net cost of labor and materials, together with vouchers. In any case, the Engineer shall certify to the amount, including reasonable allowance for overhead and profit, due to the Contractor. Pending final determination of value, payments on account of changes shall be made on the Engineer's estimate.

Art. 16. Claims for Extra Cost

If the Contractor claims that any instructions by drawings or otherwise involve extra cost under this contract, he shall give the Engineer written notice thereof within a reasonable time after the receipt of such instructions, and in any event before proceeding to execute the work, except in emergency endangering life or property, and the procedure shall then be as provided for changes in the work. No such claim shall be valid unless so made.

Art. 17. Deductions for Uncorrected Work

If the Engineer deems it inexpedient to correct

work injured or done not in accordance with the Contract, an equitable deduction from the contract price shall be made therefor.

Art. 18. Delays and Extension of Time

If the Contractor be delayed at any time in the progress of the work by any act or neglect of the Owner or of his employes, or by any other Contractor employed by the Owner, or by changes ordered in the work, or by strikes, lockouts, fire, unusual delay in transportation, unavoidable casualties or any causes beyond the Contractor's control, or by delay authorized by the Engineer pending arbitration, or by any cause which the Engineer shall decide to justify the delay, then the time of completion shall be extended for such reasonable time as the Engineer may decide.

No such extension shall be made for delay occurring more than seven days before claim therefor is made in writing to the Engineer. In the case of a continuing cause of delay only one claim is necessary.

If no schedule or agreement stating the dates upon which drawings shall be furnished is made then no claim for delay shall be allowed on account of failure to furnish drawings until two weeks after demand for such drawings and not then unless such claim be reasonable.

This article does not exclude the recovery of

damages for delay by either party under other provisions in the contract documents.

Art. 19. Correction of Work Before Final Payment

The Contractor shall promptly remove from the premises all materials condemned by the Engineer as failing to conform to the Contract, whether incorporated in the work or not, and the Contractor shall promptly replace and re-execute his own work in accordance with the Contract and without expense to the Owner and shall bear the expense of making good all work of other contractors destroyed or damaged by such removal or replacement.

If the Contractor does not remove such condemned work and materials within a reasonable time, fixed by written notice, the Owner may remove them and may store the material at the expense of the Contractor. If the Contractor does not pay the expense of such removal within ten days' time thereafter, the Owner may, upon ten days' written notice, sell such materials at auction or at private sale and shall account for the net proceeds thereof, after deducting all the costs and expenses that should have been borne by the Contractor.

Art. 20. Suspension of Work

The Owner may at any time suspend the work, or any part thereof by giving days' notice to the Contractor in writing. The work shall be resumed by the Contractor within ten (10) days after

the date fixed in the written notice from the Owner to the Contractor so to do. The Owner shall reimburse the Contractor for expense incurred by the Contractor in connection with the work under this Contract as a result of such suspension.

But if the work or any part thereof shall be stopped by the notice in writing aforesaid, and if the Owner does not give notice in writing to the Contractor to resume work at a date within (days) of the date affixed in the written notice to suspend, then the Contractor may abandon that portion of the work so suspended and he will be entitled to the estimates and payments for all work done on the portions so abandoned, if any.

Art. 21. The Owner's Right to Do Work

If the Contractor should neglect to prosecute the work properly or fail to perform any provision of this contract, the Owner, after three days' written notice to the Contractor may, without prejudice to any other remedy he may have, make good such deficiencies and may deduct the cost thereof from the payment then or thereafter due the Contractor.

Art. 22. The Owner's Right to Terminate Contract

If the Contractor should be adjudged a bankrupt, or he should make a general assignment for the benefit of his creditors, or if a receiver should be appointed on account of his insolvency, or if he should persistently or repeatedly refuse or should fail, except in cases for which extension of time is

provided, to supply enough properly skilled workmen or proper materials, or if he should fail to make prompt payment to subcontractors or for material or labor, or persistently disregard laws, ordinances or the instructions of the Engineer, or otherwise be guilty of a substantial violation of any provision of the contract, then the Owner, upon the certificate of the Engineer that sufficient cause exists to justify such action, may, without prejudice to any other right or remedy and after giving the Contractor seven days' written notice, terminate the employment of the Contractor and take possession of the premises and of all materials, tools and appliances thereon and finish the work by whatever method he may deem expedient. In such case the Contractor shall not be entitled to receive any further payment until the work is finished. If the unpaid balance of the contract price shall exceed the expense of finishing the work, including compensation for additional managerial and administrative services, such excess shall be paid to the Contractor. If such expense shall exceed such unpaid balance, the Contractor shall pay the difference to the Owner. The expense incurred by the Owner as herein provided, and the damage incurred through the Contractor's default, shall be certified by the Engineer.

Art. 23. Contractor's Right to Stop Work or Terminate Contract

If the work should be stopped under an order of any court, or other public authority, for a period

of three months, through no act or fault of the Contractor or of anyone employed by him, or if the Engineer should fail to issue any estimate for payment within seven days after it is due, or if the Owner should fail to pay the Contractor within seven days of its maturity and presentation, any sum certified by the Engineer or awarded by arbitrators, then the Contractor may, upon seven days' written notice to the Owner and the Engineer, stop work or terminate this contract and recover from the Owner payment for all work executed and any loss sustained upon any plant or materials and reasonable profit and damages.

Art. 24. Removal of Equipment

In the case of annulment of this contract before completion from any cause whatever, the Contractor, if notified to do so by the Owner, shall promptly remove any part or all of his equipment and supplies from the property of the Owner, failing which the Owner shall have the right to remove such equipment and supplies at the expense of the Contractor.

Art. 25. Use of Completed Portions

The Owner shall have the right to take possession of and use any completed or partially completed portions of the work, notwithstanding the time for completing the entire work or such portions may not have expired but such taking possession and use shall not be deemed an acceptance of any work not

completed in accordance with the Contract Documents. If such prior use increases the cost of or delays the work, the Contractor shall be entitled to such extra compensation, or extension of time, or both, as the Engineer may determine.

Art. 26. Payments Withheld

The Owner may withhold or, on account of subsequently discovered evidence, nullify the whole or a part of any certificate to such extent as may be necessary to protect himself from loss on account of:

- (a) Defective work not remedied.
- (b) Claims filed or reasonable evidence indicating probable filing of claims.
- (c) Failure of the Contractor to make payments properly to subcontractors or for material or labor.
- (d) A reasonable doubt that the contract can be completed for the balance then unpaid.
- (e) Damage to another Contractor.

When the above grounds are removed payment shall be made for amounts withheld because of them.

Art. 27. Contractor's Liability Insurance

The Contractor shall maintain such insurance as will protect him from claims under workmen's compensation acts and from any other claims for damages for personal injury, including death, which

may arise from operations under this Contract, whether such operations be by himself or by any subcontractor or anyone directly or indirectly employed by either of them. Certificates of such insurance shall be filed with the Engineer, if he so require, and shall be subject to his approval for adequacy of protection.

Art. 28. Indemnity

The Contractor shall indemnify and save harmless the Owner from and against all losses and all claims, demands, payments, suits, actions, recoveries and judgments of every nature and description brought or recovered against him, by reason of any act or omission of the said Contractor, his agents or employes, in the execution of the work or in the guarding of it.

The Contractor shall, and is hereby authorized to, maintain and pay for such insurance, issued in the name of the Owner, as will protect the Owner from his contingent liability under this contract, and the Owner's right to enforce against the Contractor any provision of this article shall be contingent upon the full compliance by the Owner with the terms of such insurance policy or policies, a copy of which shall be deposited with the Owner.

Art. 29. Fire Insurance

The Contractor shall secure, in the name of the Owner, policies of fire insurance in amount, form and companies satisfactory to the Engineer, upon

such structures and material as shall be specified by the latter, payable to the Owner for the benefit of the Contractor or the Owner as the Engineer shall find their interests to appear.

Art. 30. Guaranty Bonds

The Owner shall have the right, prior to the signing of the Contract, to require the Contractor to furnish bond covering the faithful performance of the Contract and the payment of all obligations arising thereunder, in such form as the Owner may prescribe and with such sureties as he may approve. If such bond is required by instructions given previous to the receipt of bids, the premium shall be paid by the Contractor; if subsequent thereto, it shall be paid by the Owner.

Art. 31. Damages

Any claim for damage arising under this Contract shall be made in writing to the party liable within a reasonable time of the first observance of such damage and not later than the time of final payment, except as expressly stipulated otherwise in the case of faulty work or materials, and shall be adjusted by agreement or arbitration.

Art. 32. Liens

Neither the final payment nor any part of the retained percentage shall become due until the Contractor, if required, shall deliver to the Owner a complete release of all liens arising out of this Contract, or receipts in full in lieu thereof and, if required in either case, an affidavit that so far as he

has knowledge or information the releases and receipts include all the labor and material for which a lien could be filed; but the Contractor may, if any subcontractor refuses to furnish a release or receipt in full, furnish a bond satisfactory to the Engineer, to indemnify the Owner against any lien. If any lien remains unsatisfied after all payments are made, the Contractor shall refund to the Owner all moneys that the latter may be compelled to pay in discharging such a lien, including all costs and a reasonable attorney's fee.

Art. 33. Assignment

Neither party to the Contract shall assign the Contract or sublet it as a whole without the written consent of the other, nor shall the Contractor assign any moneys due or to become due to him hereunder, without the previous written consent of the Engineer.

Art. 34. Rights of Various Interests

Wherever work being done by the Owner's forces or by other contractors is contiguous to work covered by this Contract the respective rights of the various interests involved shall be established by the Engineer, to secure the completion of the various portions of the work in general harmony.

Art. 35. Separate Contracts

The Owner reserves the right to let other contracts in connection with this work. The Contractor shall afford other contractors reasonable opportunity for

the introduction and storage of their materials and the execution of their work, and shall properly connect and co-ordinate his work with theirs.

If any part of the Contractor's work depends for proper execution or results upon the work of any other contractor, the Contractor shall inspect and promptly report to the Engineer any defects in such work that render it unsuitable for such proper execution and results. His failure so to inspect and report shall constitute an acceptance of the other contractor's work as fit and proper for the reception of his work, except as to defects which may develop in the other contractor's work after the execution of his work.

To insure the proper execution of his subsequent work the Contractor shall measure work already in place and shall at once report to the Engineer any discrepancy between the executed work and the drawings.

Art. 36. Subcontracts

The Contractor shall, as soon as practicable after the signing of the Contract, notify the Engineer in writing of the names of subcontractors proposed for the work and shall not employ any that the Engineer may within a reasonable time object to as incompetent or unfit.

The Contractor agrees that he is as fully responsible to the Owner for the acts and omissions of his subcontractors and of persons either directly or in-

directly employed by them, as he is for the acts and omissions of persons directly employed by him.

Nothing contained in the Contract Documents shall create any contractual relation between any subcontractor and the Owner.

Art. 37. Points and Instructions

The Contractor shall provide reasonable and necessary opportunities and facilities for setting points and making measurements. He shall not proceed until he has made timely demand upon the Engineer for, and has received from him, such points and instructions as may be necessary as the work progresses. The work shall be done in strict conformity with such points and instructions.

The Contractor shall carefully preserve bench marks, reference points and stakes, and in case of wilful or careless destruction, he shall be charged with the resulting expense and shall be responsible for any mistakes that may be caused by their unnecessary loss or disturbance.

Art. 38. Engineer's Status

The Engineer shall have general supervision and direction of the work. He has authority to stop the work whenever such stoppage may be necessary to insure the proper execution of the Contract. He shall also have authority to reject all work and materials which do not conform to the contract, to direct the application of forces to any portion of the work, as in his judgment is required, and to order

the force increased or diminished, and to decide questions which arise in the execution of the work.

Art. 39. Engineer's Decisions

The Engineer shall, within a reasonable time after their presentation to him, make decisions in writing on all claims of the Owner or the Contractor and on all other matters relating to the execution and progress of the work or the interpretation of the Contract Documents.

All such decisions of the Engineer shall be final except in cases where time and/or financial considerations are involved, which, if no agreement in regard thereto is reached, shall be subject to arbitration.

Art. 40. Arbitration

(a) Demand for Arbitration.—Any decision of the Engineer which is subject to arbitration shall be submitted to arbitration upon the demand of either party to the dispute.

The Contractor shall not cause a delay of the work because of the pendency of arbitration proceedings, except with the written permission of the Engineer, and then only until the arbitrators shall have an opportunity to determine whether or not the work shall continue until they decide the matters in dispute.

The demand for arbitration shall be delivered in writing to the Engineer and the adverse party, either personally or by registered mail to the last

known address of each, within ten days of the receipt of the Engineer's decision, and in no case after final payment has been accepted except as otherwise expressly stipulated in the Contract Documents. If the Engineer fails to make a decision within a reasonable time, a demand for arbitration may be made as if his decision had been rendered against the demanding party.

(b)—Arbitrators.—No one shall be nominated or act as an arbitrator who is in any way financially interested in this Contract or in the business affairs of the owner, or the Contractor or the Engineer, or otherwise connected with any of them. Each arbitrator shall be a person in general familiar with the work or the problem involved in the dispute submitted to arbitration.

Unless otherwise provided by controlling statutes, the parties may agree upon one arbitrator; otherwise there shall be three, one named in writing, by each party to this Contract, to the other party, and the third chosen by those two arbitrators, or if they should fail to select a third within fifteen days, then he shall be appointed by the presiding officer, if a disinterested party, of the Bar Association nearest to the location of the work.* Should the party demanding arbitration fail to name an arbitrator within ten days of his demand, his right to arbitration shall lapse. Should the other party fail to name an arbitrator within said ten days, then said* pre-

*To provide some other agency for appointing arbitrators strike out reference to presiding officer

siding officer shall appoint such arbitrator within ten days, and upon his failure so to do then such arbitrator shall be appointed on the petition of the party demanding arbitration by a judge of the Federal Court in the district where such arbitration is to be held.

The said* presiding officer shall have the power to declare the position of any arbitrator vacant by reason of refusal or inability to act, sickness, death, resignation, absence or neglect. Any vacancy shall be filled by the party making the original appointment, and unless so filled within five days after the same has been declared, it shall be filled by the said* presiding officer. If testimony has been taken before a vacancy has been filled, the matter must be reheard unless a rehearing is waived in the submission or by the written consent of the parties.

If there be one arbitrator his decision shall be binding; if three, the decision of any two shall be binding in respect to both the matters submitted to

of the Bar Association and insert desired designation. In the vicinity of New York, the Arbitration Society of America, Inc., and the Chamber of Commerce of the State of New York have Arbitration Committees which often act in this capacity.

*To provide some other agency for appointing arbitrators strike out reference to presiding officer of the Bar Association and insert desired designation. In the vicinity of New York, the Arbitration Society of America, Inc., and the Chamber of Commerce of the State of New York have Arbitration Committees which often act in this capacity.

and the procedure followed during the arbitration. Such decision shall be a condition precedent to any right of legal action.

(c) Arbitration Procedure. — The arbitrators shall deliver a written notice to each of the parties and to the Engineer, either personally or by registered mail to the last known address of each, of the time and place for the beginning of the hearing of the matters submitted to them. Each party may submit to the arbitrators such evidence and argument as he may desire and the arbitrators may consider pertinent. The arbitrators shall, however, be the judges of all matters of law and fact relating to both the subject matters of and the procedure during arbitration and shall not be bound by technical rules of law or procedure. They may hear evidence in whatever form they desire. The parties may be represented before them by such person as each may select, subject to the disciplinary power of the arbitrators if such representative shall interfere with the orderly or speedy conduct of the proceedings.

Each party and the Engineer shall supply the arbitrators with such papers and information as they may demand, or with any witness whose movements are subject to their respective control, and upon refusal or neglect to comply with such demands the arbitrators may render their decision without the evidence which might have been elicited therefrom and the absence of such evidence shall afford no ground for challenge of the award by the party refusing or neglecting to comply with such demand.

The submission to arbitration (the statement of the matters in dispute between the parties to be passed upon by the arbitrators) shall be in writing duly acknowledged before a notary. Unless waived in writing by both parties to the arbitration, the arbitrators, before hearing testimony, shall be sworn by an officer authorized by law to administer an oath, faithfully and fairly to hear and examine the matters in controversy and to make a just award according to the best of their understanding.

The arbitrators, if they deem the case demands it, are authorized to award to the party whose contention is sustained such sums as they shall consider proper for the time, expense and trouble incident to the arbitration, and if the arbitration was demanded without reasonable cause, damages for delay and other losses. The arbitrators shall fix their own compensation, unless otherwise provided by agreement, and shall assess the costs and charges of the arbitration upon either or both parties.

The award of the arbitrators shall be in writing and acknowledged like a deed to be recorded, and a duplicate shall be delivered personally or by registered mail, forthwith upon its rendition, to each of the parties to the controversy and to the Engineer. Judgment may be rendered upon the award by the Federal Court or the highest State Court having jurisdiction to render same.

The award of the arbitrators shall not be open to objection on account of the form of the proceedings

or the award, unless otherwise provided by the controlling statutes. In the event of such statutes providing on any matter covered by this Article otherwise than as hereinbefore specified, the method of procedure throughout and the legal effect of the award shall be wholly in accord with said statutes, it being the intention hereby to lay down a principle of action to be followed, leaving its local application to be adapted to the legal requirements of the jurisdiction having authority over the arbitration.

The Engineer shall not be deemed a party to the dispute. He is given the right to appear before the arbitrators to explain the basis of his decision and give such evidence as they may require.

Art. 41. Lands for Work

The Owner shall provide the lands upon which the work under this Contract is to be done, except that the Contractor shall provide land required for the erection of temporary construction facilities and storage of his material, together with right of access to same.

Art. 42. Cleaning Up

The Contractor shall, as directed by the Engineer, remove from the Owner's property and from all public and private property, at his own expense, all temporary structures, rubbish and waste materials resulting from his operations.

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AFFIDAVIT OF LESTER R. GAMBLE IN
SUPPORT OF MOTION FOR SUMMARY
JUDGMENT

State of Washington,
County of Spokane—ss.

Lester R. Gamble, being first duly sworn, deposes and says: I am Chief Engineer of The Washington Water Power Company, and have personal knowledge of the facts herein set forth, or have taken all data submitted herewith from the records of The Washington Water Power Company, which have been kept in the regular course of business and which are under my direct control and supervision.

This Affidavit is submitted in support of the defendant's Motion for Summary Judgment herein for the purpose of showing that there is in this action no genuine issue as to any material fact and that the defendant is entitled to judgment as a matter of law.

The Washington Water Power Company is a public utility company owning and operating an electric utility system, including power generating plants and associated works and facilities, transmission and distribution facilities serving residential, rural, commercial, and industrial customers in the eastern part of the State of Washington and in the northwestern and west central parts of the State of Idaho.

Since shortly after the incorporation of The Washington Water Power Company in 1889, The Washington Water Power Company has engaged in the business of constructing and maintaining electric transmission lines, including the changing of wires, insulators and cross-arms. The changing of wires is hereinafter referred to as "reconductor-ing." During the period between the incorporation of The Washington Water Power Company and the present time, the Company has done most of the construction and reconductoring of transmission lines through the medium of its own employees directly employed by the company. On occasions, when all the regular employees of the company are occupied and it is necessary to build additional transmission lines, which the company cannot take care of with its own crews, the company has contracted out the building of transmission lines to contractors. Prior to 1942 such occasions were comparatively rare. During the 1940's this practice increased considerably due to the shortage of manpower brought about by World War II, and to the tremendously accelerated construction program during and immediately following World War II. At the present time the amount of contract work on lines energized at 13,000 volts and over is shown by the chart attached hereto and labeled as Exhibit "A," which chart shows the amount of construction done by company employees versus that done by contractors and the amount of reconductoring done by the company versus the amount done by contractors over the last five-year period. This chart was pre-

pared by me or under my direct supervision from the original records of the Company which are kept in the normal course of business.

During the past five-year period, the company has constructed approximately half of its own major lines and has had the other half constructed by contract. The reconductoring of lines that are already established is generally a fairly small item in the construction budget. During the past five years, the company has employed contractors to reductor lines only during one year, the year 1954, when the company found it necessary to do an unusual amount of reconductoring. The company generally maintains construction crews sufficient to take care of ordinary construction programs, which crews can be kept occupied on a year around basis. To the extent that the company cannot construct its own lines with its own crews, it contracts out the construction on a bid basis.

In the public utility industry generally, the construction and reductoring of transmission lines is considered part of the business of the utility.

In the electric utility industry it is not considered particularly dangerous to construct or reductor transmission lines over transmission or other lines carrying electric current. Experienced workmen can make such crossings in relative safety if they follow recognized procedures. The Lewis Construction Company was experienced in working with electric transmission lines and represented itself to

be competent to make crossings over lines carrying electric currents.

/s/ LESTER R. GAMBLE.

Subscribed and Sworn to before me this 30th day of June, 1955.

[Seal] /s/ ALAN P. O'KELLY,
Notary Public in and for the State of Washington,
Residing at Spokane Therein.

EXHIBIT 1

The Washington Water Power Company

Major Line Construction, 13,000 volts and over—
1950 to 1954 Inclusive

Constructed by WWPCo. Crews and by Contractor

		<u>Total Construction Cost</u>			
Year	Type of Construction	WWP Crew		Contractor	
		Miles	Cost	Miles	Cost
1950	New line	23.5	\$ 183,225	39	\$298,518
1950	Reconductor	5.85	12,000		
1951	New line	52.25	177,956	20.2	88,114
1951	Reconductor				
1952	New line	50.7	154,615	14.7	154,788
1952	Reconductor	2.0	8,000		
1953	New line	51.2	289,640	39.5	256,783
1953	Reconductor	1.5	6,000		
1954	New line	48.3	314,668	52.5	343,793
1954	Reconductor	5.6	13,500	21.33	127,953

AFFIDAVIT OF J. FLETCHER EMERY

State of Idaho,
County of Ada—ss.

J. Fletcher Emery, being first duly sworn, deposes and says: I am Superintendent of Electrical Operations and Construction of the Idaho Power Company and have personal knowledge of the facts herein set forth, or have taken all data submitted herewith from the records of Idaho Power Company, which records have been kept in the regular course of business and are maintained under my direct control and supervision.

The Idaho Power Company is a public utility company owning and operating an electrical utility system, including power generating plants and associated works and facilities, transmission and distribution facilities, serving residential, rural, commercial and industrial customers in the southern part of the State of Idaho and in eastern Oregon and northern Nevada.

The Idaho Power Company in the course of its business as a public utility engages in the construction and maintenance of electric transmission and distribution lines, including the changing of wires, insulators and crossarms. The changing of wires is hereinafter referred to as "reconductoring."

The construction and reconductoring of lines has generally been performed by employes of the Company with the company training and maintaining a group of employes to perform these tasks. In some

instances, because of traveling problems or conflicting duties, the Company engages independent contractors to perform the necessary construction and reconductoring. However, in recent years the amount of contract work has been materially reduced and, in fact, for the years 1952, 1953 and 1954, all construction and reconductoring was performed by the Company employees.

For the purpose of illustrating the amount of line construction and reconductoring by the Idaho Power Company over the past five years, and the proportion of said work performed by contractors, there is attached hereto a chart denominated as Exhibit "A." This chart was prepared under my direct supervision from the original records of the Company which are kept in the normal business of the Company and is a true representation of the facts stated therein.

Dated at Boise, Idaho, this 13th day of June, 1955.

/s/ T. FLETCHER EMERY.

Subscribed and sworn to before me this 13th day of June, 1955.

[Seal] /s/ MARGARET A. WILLIAMS,
Notary Public Residing at
Boise, Idaho.

My Commission expires April 21, 1959.

EXHIBIT "A"

Idaho Power Company
Major Line Construction, 13,000 volts and over—
1950 to 1954 Inclusive

Constructed by IPCo Crews and Various Contractors

Year	Type of Construction	<u>Total Construction Cost</u>			
		IPCo Crew		Contractor	
		Miles	Cost	Miles	Cost
1950	New line	216.53	\$3,748,845	44.11	\$293,724
1950	Reconductor				
1951	New line	181.63	1,307,374	5.91	23,327
1951	Reconductor				
1952	New line	117.12	1,149,259		
1952	Reconductor				
1953	New line	174.39	2,108,799		
1953	Reconductor	16.60	24,757		
1954	New line	124.68	1,347,586		
1954	Reconductor	3.2	30,000		

DEH:im

6-9-55

AFFIDAVIT OF THOMAS A. PURTON

State of Utah,

County of Salt Lake—ss.

Thomas A. Purton, being first duly sworn, deposes and says:

That I am Chief Engineer of the Utah Power & Light Company, an electric public utility duly authorized and doing business in the States of Utah, Idaho and Wyoming, with extensive generation, transmission and distribution systems located principally in the States of Utah and Idaho; that I am also Chief Engineer of The Western Colorado

Power Company, an electric utility generating, transmitting and distributing electric energy on the western slope in the vicinity of Montrose, Durango, and surrounding areas, Colorado.

That I have been continuously engaged in electric public utility work in excess of thirty-five years and hold degrees from the University of Kansas as a Bachelor of Science, Mechanical Engineer and Electrical Engineer; that I am duly licensed as a Professional Engineer in the State of Idaho, my Certificate Number in said State being 255; duly licensed as a Professional Engineer in the State of Utah, my Number in said State being 1008; and duly licensed as a professional Engineer in the State of Colorado, my license Number in said State being 852.

That as Chief Engineer of said Companies, I have access to the records having to do with the construction, reconstruction, replacement, relocation, maintenance, repair, reconductoring, and other matters relating to transmission and distribution lines and pertinent facilities.

That I know of my own knowledge that the Utah Power & Light Company and its subsidiary The Western Colorado Power Company have maintained and do maintain as a part of their general business activity as electrical corporations, a substantial number of crews whose primary duty is the construction, reconstruction, replacement, relocation, maintenance, repair, reconductoring, etc., of transmission and distribution lines and equipment.

That in the past, during slack periods, all of the construction, reconstruction, replacement, relocation, maintenance, repair, and reconductoring at times has been done solely by employes of the respective Companies. In recent years and during certain times in the past, due to accelerated expansion programs, it has been impractical for these Companies to maintain sufficient forces on their own payrolls and equipment to handle all of the construction, reconstruction, replacement, relocation, maintenance, repair, reconductoring and pertinent activities in connection with its transmission and distribution systems and, under these circumstances and as a part of the general business activity of these Companies, it has been necessary to enter into contracts with independent contractors for the construction, reconstruction, replacement, relocation, maintenance, repair, reconductoring, etc., of a part of the transmission and distribution facilities of said Companies.

The attached Exhibit "A," which by this reference is incorporated as a part of this Affidavit, indicates in dollars the amount of work on transmission and distribution facilities which Utah Power & Light Company has performed by its own line crews and similar work which has been done by Contractors for the years 1953 and 1954.

I further state of my own knowledge that it is a general practice among electric utilities to follow the procedures above outlined with reference to performing a part of the construction, reconstruction, replacement, relocation, maintenance, repair, recon-

ductoring, etc., of the facilities mentioned with their own forces and under certain circumstances to contract with independent contractors for construction, reconstruction, replacement, relocation, maintenance, repair, reductoring, etc., of some transmission and distribution facilities.

I also state of my own knowledge that the construction, reconstruction, replacement, relocation, maintenance, repair, reductoring and other matters pertaining to transmission and distribution lines of electric utilities are definitely considered a part of the electric utility business.

/s/ THOMAS A. PURTON.

Subscribed and sworn to before me this 6th day of June, 1955.

[Seal] /s/ CHAS. L. OVARD,
Notary Public.

My Commission expires: Aug. 26, 1956.

EXHIBIT "A"

Utah Power & Light Company

Transmission and Distribution Lines constructed or rebuilt by Utah Power & Light Company and contractors for Utah Power & Light Company system during 1953 and 1954.

Year	Type of Construction	Work done by		
		UP&L Co. Line Crews	Work done by Contractors	Total
1953	Transmission	\$ 168,601	\$ 478,159	\$ 646,760
1953	Distribution	1,192,966	525,393	1,718,359
1954	Transmission	514,143	530,202	1,044,345
1954	Distribution	1,203,193	249,457	1,452,650

AFFIDAVIT OF R. E. FORMAN

State of Oregon,
County of Multnomah—ss.

R. E. Forman, being first duly sworn, deposes and says:

I am an electrical engineer of Pacific Power & Light Company, and having had supervision of line construction for the years of 1950 to 1953, inclusive, have personal knowledge of facts herein set forth, or have taken all data submitted herein from the records of the Pacific Power & Light Company which have been kept in the regular course of business and which were derived from records and reports which were under my supervision for the period stated above.

Pacific Power & Light Company is a public company owning and operating an electric utility system, including power generating plants and associated works and facilities, transmission and distribution facilities serving residential, rural, commercial and industrial customers in the states of Oregon, Washington, Northern Idaho, Western Montana, and Wyoming.

Since the incorporation of Pacific Power & Light Company in 1910, Pacific Power & Light Company has engaged in constructing and maintaining electric transmission lines, including the changing of wires, insulators and crossarms. The changing of wires is hereinafter referred to as "reconductor-

ing." Throughout the period of time from 1910 to the present time, the Company has in general done most of the construction and reconductoring of transmission and distribution lines through the medium of its own employees directly employed by the Company. On occasions, however, when it is necessary to build or reconductor lines, and the Company cannot take care of the work with its own crews, the Company has contracted out the building or reconductoring of lines to contractors. The amount of such work done by the Company's own crews and that done by contractors varies from time to time, depending upon availability of manpower and the relative amount of construction undertaken at any one time. However, the Company has undertaken the majority of new construction work and of reconductoring with its own employees.

There is submitted herewith as Exhibit I, which by this reference is incorporated herein as though fully set forth herein, a chart showing the amount of construction and reconductoring undertaken respectively by Company employees and by Company contractors during the last five-year period. This chart applies to all lines constructed or reducted by the Company of a capacity of 24,000 volts or higher. This chart was prepared by me or under my direct supervision from the original records of the Company which are kept in the normal course of business.

Certain lines of a capacity below 24,000 volts are in service on the Company's system, but records of

construction and reconductoring work on such lines are maintained in a different manner than records on lines of 24,000 volts or higher, and as a consequence records of the actual mileage of such lines constructed or reconductored are not readily available. However, such work is normally undertaken by line crews of the district offices of the Company, and work by independent contractors will in general be considerably less in proportion to total work than is true with reference to work on lines of 24,000 volts or higher.

During the past five-year period, the Company has undertaken thirty-three separate construction or reconductoring projects, of which only six were contract. In terms of line miles, the Company has performed 67% of its new construction and reconstruction work on transmission lines with its own crews, the remaining 33% being done by contractors.

It is my understanding and belief that the practices followed by Pacific Power & Light Company as described herein are substantially the same as those normally pursued by other companies engaged in the public utility business.

/s/ R. E. GORMAN.

Subscribed and sworn to before me this 27th day of June, 1955.

[Seal] /s/ JOS. W. QUICK,

Notary Public for Oregon.

My Commission expires June 20, 1957.

EXHIBIT I

Pacific Power & Light Company

Transmission Line Construction, Including Reconductoring,
1950-195424 KV and Higher
(Approximate *)

Year	Company Crews		Contract	
	Miles	Cost	Miles	Cost
1950	2.64	\$ 169,478	4.06	\$ 108,159
1951	2.20	41,567	63.42	942,783
1952	25.20	670,990		
1953	68.39	924,226		
1954	40.14	583,950		
Total	138.57	\$2,390,211	67.48	\$1,050,942

*(Source of figures, records of Accounting Department showing year cost of construction taken into rate base, adjusted to show, approximately, progress of construction by year.)

AFFIDAVIT OF VIRGIL THOMPSON IN
SUPPORT OF MOTION FOR SUMMARY
JUDGMENT

State of Idaho,
County of Shoshone—ss.

Virgil Thompson, being first duly sworn on oath, deposes and says: That I am District Manager for The Washington Water Power Company, with offices located at Wallace, Idaho, and have personal knowledge of the facts herein set forth or have taken all data submitted herewith from the books

of The Washington Water Power Company which have been kept in the regular course of business and which are under my direct control and supervision.

This Affidavit is submitted in support of the defendant's Motion for Summary Judgment herein for the purpose of showing that there is in this action no genuine issue as to any material fact and that defendant is entitled to judgment as a matter of law.

That on July 11, 1954, I was District Manager for The Washington Water Power Company, with offices located at Wallace, Idaho, and that a 13,000 volt distribution line in Nine Mile Canyon was under my direct control and supervision, which line passed under a 110,000 volt line which Lewis Construction Company was reconductoring on behalf of The Washington Water Power Company and which 110,000 volt transmission line dropped into the said 13,000 volt line on or about July 11, 1954, resulting in the death of George Beedy.

That said 13,000 volt feeder line involved in the accident on July 11, 1954, supplied approximately 190 residential and commercial customers, the Day Rock Mine, the Sunset Lease Mine, the Jack Waite Mine, the Bear Top Mine, the Rex Mill, the Wallace Meat Packing Plant and the Burns Yack Lumber Company, and there was no alternative source of electric power to supply these customers.

That long prior to July 11, 1954, the Lewis Con-

struction Company was advised by me that The Washington Water Power Company could not and would not de-energize the 13,000 volt line while Lewis Construction Company was reconductoring the 110,000 volt line which passed over the 13,000 volt line, and the Lewis Construction Company at all times during the progress of its work anticipated and expected to recondutor the 110,000 volt line without the power ever being cut off on the 13,000 volt Nine Mile feeder line.

That the decision that the power could not be cut on the Nine Mile feeder line was made by me in the exercise of my discretion and in the light of my knowledge of the conditions on the Nine Mile feeder line. Cutting the power on line serving mines results not only in work stoppages, but also in the flooding of mines which have water problems and results in serious problems to mine owners who are using forced ventilation to ventilate their mines; it creates spoilage problems for meat packing plants, causes shutdowns and economic loss to saw-mills and results in serious inconvenience to residential and commercial customers. All of these conditions existed on this line. The shutdown on a line of this sort is made only when absolutely essential and then only for the shortest possible time. The construction of a new line or the reconductoring of an old line which crosses over an energized line is not considered such an emergency as to justify the economic loss and inconvenience resulting from shutting down a line with the number and

type of customers that are located on this line. The Lewis Construction Company was experienced in working with electric transmission lines and represented that it was competent to work over and around energized electric circuits.

/s/ VIRGIL N. THOMPSON.

Subscribed and Sworn to before me this 13th day of June, 1955.

[Seal] /s/ B. J. OENNING,
Notary Public in and for the State of Idaho, Residing at Mullan.

Commission expires Sept. 1, 1956.

[Endorsed]: Filed July 5, 1955.

[Title of District Court and Cause.]

MINUTES OF JULY 7, 1955

Upon application of Glen Coughlan, one of the Counsel for the plaintiff, the Court being advised and good cause appearing, it is ordered that the time for filing affidavits in opposition to a Summary Judgment be, and the same is hereby enlarged, up to and including July 22, 1955.

[Title of District Court and Cause.]

CROSS-MOTION FOR SUMMARY
JUDGMENT

The plaintiffs, Guenith Opal Beedy and Cynthia Guen Beedy, by his next friend, Guenith Opal Beedy, by Thomas B. Payne and Glenn A. Coughlan, their attorneys, hereby make Cross-Motion to the Court to enter a summary judgment for the plaintiffs in accordance with the provisions of Rule 56 (b) and (c) of the Rules of Civil Procedure on the ground that the pleadings, affidavits of Jack P. Inman, Thomas Payne and Glenn A. Coughlan thereto attached, and the depositions of Ed Raunig, Jack P. Inman and Sam Hammar on file herein, show that plaintiffs are entitled to judgment as a matter of law.

Dated this 21st day of July, 1955.

/s/ THOMAS B. PAYNE,

/s/ GLENN A. COUGHLAN,

Attorneys for the Plaintiffs.

To: McNaughton & Sanderson and Paine, Lowe,
Coffin, Ennis & Herman, Attorneys for Defendant:

Please Take Notice that plaintiffs will bring on for hearing the above Cross-Motion for Summary Judgment on the date set for hearing of defendant's Motion for Summary Judgment.

Dated this 21st day of July, 1955.

/s/ THOMAS B. PAYNE,

/s/ GLENN A. COUGHLAN,

Attorneys for the Plaintiffs.

AFFIDAVIT OF GLENN A. COUGHLAN IN
SUPPORT OF CROSS-MOTION FOR SUM-
MARY JUDGMENT BY PLAINTIFFS

State of Idaho,
County of Ada—ss.

Glenn A. Coughlan, being first duly sworn, de-
poses and says:

That I am one of the attorneys for the plaintiffs
in the above-entitled action.

This Affidavit is submitted in support of plain-
tiffs' Cross-Motion for summary judgment herein
for the purpose of showing that in this action there
is no genuine issue as to any material fact and that
plaintiffs are entitled to judgment as a matter of
law.

That examination of the affidavits submitted by
the defendant in this action, together with the
depositions of Edward Raunig and Jack P. Inman,
reveal that the defendant was not engaged in the
business of building power lines for profit, but that
they had engaged the Lewis Construction Company
as an independent contractor as is expressly shown
by the Exhibit, being a copy of the contract, at-

tached to the deposition of Ed Raunig, and that as such they had no control over the independent contractor, Lewis Construction Company.

That the defendant, The Washington Water Power, is not in the business of constructing power lines or reconductoring the same for pecuniary gain; that the work of this type which they do is merely incidental to their business of generating and selling electrical power.

That the depositions of Ed Raunig and Sam Hammar reveal that cut-offs were made on the job subsequent to the fatal accident.

That the affidavit of Virgil Thompson, local Manager of the Power Company, states definitely that the power company absolutely refused to cut off the power; as a result of this refusal, George Beedy met his death, and Jack P. Inman was seriously injured.

That this absolute refusal leaves no material fact in issue as to the defendant's negligence and cause of the accident in this case since the defendant had actual notice of the dangerous condition on this line and further notice of similar occurrences on the same job when other people were injured, and that their inspectors were present on the line during all these times, as appears by the deposition of Sam Hammar and affidavit of Jack P. Inman, and that in spite of notice refused to de-energize the line when so requested by Ed Raunig, Superintendent of Lewis Construction Company, on the

particular crossing where the fatal accident occurred, as appears by his deposition on file herein.

That the contract attached to the deposition of Ed Raunig shows that the Lewis Construction Company was an independent contractor of the defendant; that the affidavit of B. J. Lindsay attached to defendant's Motion for Summary Judgment shows that the work was being performed on defendant's premises; that the defendant under such circumstances owes the employees of their independent contractor a safe place to work; that the defendant deliberately breached this duty by their arbitrary refusal to cut off the power at the place of the fatal accident of George Beedy, as shown by the affidavit of Virgil Thompson, with knowledge of the extremely dangerous conditions existing and the knowledge of prior similar occurrences, as shown by the affidavit of Jack P. Inman attached to plaintiffs' Cross-Motion for Summmary Judgment, and the deposition of Sam Hammar filed in this cause.

That the plaintiffs are entitled under the record to a summary judgment leaving only the question of amount of damages for submission to the jury.

/s/ GLENN A. COUGHLAN.

Subscribed and Sworn to before me this 21st day of July, 1955.

[Seal] /s/ JOSEPH M. INHOFF, JR.,
Notary Public for Idaho,
Residing at Boise, Idaho.

AFFIDAVIT OF THOMAS PAYNE IN SUP-
PORT OF CROSS-MOTION FOR SUMMARY
JUDGMENT BY PLAINTIFFS

State of Idaho,
County of Shoshone—ss.

Thomas Payne, being first duly sworn, deposes and says:

That I reside at Wallace, Idaho, and am familiar with the site and power line between Government Gulch and Burke Sub-station and the line running up Nine-Mile Canyon where the fatal accident of George Beedy occurred.

That the area served by the Nine-Mile area line is very sparsely populated.

That the packing plant mentioned by Virgil Thompson in his Affidavit was not operating; that the mines operating in the area and served by The Washington Water Power were operating on a very limited basis with small working crews.

That the date on which the accident occurred killing George Beedy and injuring Jack Inman was Sunday and that the line could have been de-energized with a minimum of inconvenience to the users of power in that area.

That the defendant by virtue of its experience in handling the extremely dangerous commodity of high voltage electricity and having its inspectors upon the premises where the accident occurred, and

having knowledge of similar accidents immediately prior to the killing of George Beedy, and having actual knowledge of the dangerous condition existing, was grossly negligent in failing to comply with the request to de-energize the line which would have saved the life of George Beedy.

That the defendant is not engaged in the business of construction or reconductoring of power lines for pecuniary gain; that power line work done by the defendant is only incident to their function for pecuniary gain of generating and selling electrical power; defendant does not engage competitively with companies whose business is that of power line construction.

/s/ THOMAS PAYNE.

Subscribed and Sworn to before me this 16th day of July, 1955.

[Seal] /s/ F. C. KEANE,

Notary Public in and for the State of Idaho, Residing at Wallace, Idaho.

AFFIDAVIT OF JACK P. INMAN IN SUP-
PORT OF CROSS-MOTION FOR SUM-
MARY JUDGMENT BY PLAINTIFFS

State of Washington,
County of Spokane—ss.

Jack P. Inman, being first duly sworn, deposes and says:

That he is an equipment operator on transmission line construction for electric power companies and that he was so engaged in his occupation for the Lewis Construction Company of Great Falls, Montana, from May 12th to July 11, 1954, on a contract with the Washington Water Power for work between Government Gulch Sub-station to Burke Sub-station in Idaho.

This Affidavit is submitted in support of plaintiffs' Cross-Motion for Summary Judgment herein for the purpose of showing there is no genuine issue as to any material fact and that the plaintiffs are entitled to judgment as a matter of law.

That between the 20th day of May, 1954, and the 11th day of July, 1954, four previous accidents similiar in character to the one of July 11, 1954, occurred wherein the line being strung fell into a thirteen thousand volt line; that on at least three additional occasions accidents occurred wherein the line being strung fell either into trees, upon the ground and into energized wires; that on an occasion where the line being strung fell into a thirteen thousand-volt line on or about the 15th day of June, 1954,

east of the Kellogg cemetery three men were burned with electrical energy; that in each of the instances the Washington Water Power Company had actual notice at the time by their inspectors and officials being present or obtained knowledge of the occurrences subsequent thereto and prior to the 11th day of July, 1954; that the defendant by reason of such knowledge knew of the dangerous condition of the operation, including the operation at the place where the fatal accident occurred.

That the fatal accident occurred on Sunday and under conditions and circumstances wherein the power could have been cut off for a sufficient period of time to have permitted the crossing to have been made in safety with a minimum of inconvenience to everyone concerned and the saving of the life of George Beedy and the prevention of injury to myself.

That prior to the fatal accident during the stringing operations the power was cut off on other crossings.

That the defendant had all during the period of the job up to the fatal accident inspectors upon the line daily and they knew the conditions leading up to the fatal accident, the extremely dangerous operation and the numerous accidents which occurred; that under the conditions existing, the refusal of the defendant to de-energize the 13,000 volt line at the place of the fatal accident showed absolute disregard for safety of the men working on the job.

/s/ JACK P. INMAN.

Subscribed and Sworn to before me this 14th day of July, 1955.

[Seal]. /s/ TOM B. PAYNE,
Notary Public in and for the State of Washington,
Residing at:

[Endorsed]: Filed July 22, 1955.

[Title of District Court and Cause.]

MOTION TO STRIKE AFFIDAVITS 'ON
MOTION FOR SUMMARY JUDGMENT

Comes Now the defendant, The Washington Water Power Company, and moves that the affidavits of Glenn A. Coughlan, Thomas Payne and Jack P. Inman in support of plaintiffs' Cross-Motion for Summary Judgment, and each and every part thereof, be stricken, on the ground and for the reason that the affidavits are not made on personal knowledge and do not set forth such facts as would be admissible in evidence or do not show that the affiant is competent to testify as to the matters therein; that the statements in said affidavits are matters as to opinion, belief or conclusions of law.

Dated this 4th day of August, 1955.

McNAUGHTON & SANDERSON,
PAINE, LOWE, COFFIN,
ENNIS & HERMAN,

By /s/ ALAN P. O'KELLY,
Attorneys for Defendant.

[Endorsed]: Filed August 4, 1955.

[Title of District Court and Cause.]

MINUTES OF AUGUST 5, 1955

This cause came on regularly this date in open court for hearing on plaintiffs' motion for summary judgment and defendant's cross-motion for summary judgment, Glenn A. Coughlan appearing for the plaintiff's and Alan P. O'Kelly appearing as counsel for the defendant.

After a discussion by counsel of the respective parties, it was ordered that the depositions of Jack P. Inman, Ed. F. Rainy, Ruben Liddell Brown and Sam Hammar be published and it was further ordered by the Court that this matter be taken under advisement.

[Title of District Court and Cause.]

MEMORANDUM DECISION

Healy, Acting District Judge.

Plaintiffs and defendant have each moved for summary judgment. The motions have been briefed and orally argued and submitted for decision. The court agrees with counsel that no material issue of fact remains to be determined and that the case is ripe for decision on the motions.

The motions of defendant, Washington Water Power Co., is granted, and judgment in its favor is directed to be entered accordingly.

[Endorsed]: Filed August 15, 1955.

In the District Court of the United States, in and
for the District of Idaho, Northern Division
No. 1999

GUENITH OPAL BEEDY and CYNTHIA
GUEN BEEDY, by His Next Friend, GUEN-
ITH OPAL BEEDY,

Plaintiffs,

vs.

THE WASHINGTON WATER POWER CO.,
a Corporation,

Defendant.

SUMMARY JUDGMENT

The motion of the defendant for summary judgment and the cross-motion of the plaintiffs for summary judgment, pursuant to Rule 56 of the Rules of Civil Procedure having been presented, and the Court being fully advised:

The Court finds that the defendant is entitled to a summary judgment as a matter of law.

It Is, Therefore, Ordered and Decreed that defendant's motion for summary judgment be and the same is hereby granted; that the plaintiffs have and recover nothing by their suit; that the defendant, The Washington Water Power Company, recover its costs and charges in its behalf expended.

Dated this 24th day of August, 1955.

/s/ WILLIAM HEALY,
Acting District Judge.

[Endorsed]: Filed August 26, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Guenith Opal Beedy and Cynthia Guen Beedy, by his next friend, Guenith Opal Beedy, plaintiffs above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the Summary Judgment entered in this action on August 26, 1955.

Dated this 7th day of September, 1955.

/s/ THOMAS B. PAYNE,

/s/ GLENN A. COUGHLAN,

Attorneys for Appellants.

[Endorsed]: Filed September 8, 1955.

United States Court of Appeals
for the Ninth Circuit

File No. 1999

GUENITH OPAL BEEDY and CYNTHIA GUEN
BEEDY, by His Next Friend, GUENITH
OPAL BEEDY,

Appellants,

vs.

THE WASHINGTON WATER POWER CO.,
a Corporation,

Respondent.

STATEMENT OF POINTS ON WHICH AP-
PELLANTS INTEND TO RELY ON
APPEAL

Comes Now the Appellants and make the follow-
ing statement of points upon which they intend to
rely upon the appeal taken by them to the Court
of appeals for the Ninth Circuit in the above-en-
titled cause:

I.

That the Court erred in finding that the defendant
was entitled to a Summary Judgment as a matter
of law.

II.

That the Court erred in entering Judgment that
plaintiffs have and recover nothing by their suit,
and that the defendant, The Washington Water
Power Company, recover its costs and charges in
its behalf expended.

III.

That the defendant was not the employer of the deceased under the Idaho Workmen's Compensation Law so as to preclude a common law action by the wife and child of deceased.

IV.

That the Cross-Motion of the Plaintiffs for summary Judgment should have been granted.

V.

That the records show notice to the defendant of prior similiar occurrences to the one by which George Beedy met his death; that the defendant had been requested to cut off the power which would have prevented the accident and that in spite of the notice and request above referred to, defendant refused to cut off the power as a result of which deceased was killed.

VI.

That the Court erred in denying the plaintiffs right to trial by jury of the issues of fact set up in the complaint; and the issues of fact improperly raised by the defendant in its Motion and Affidavit, that is, to the effect that it was in business of repairing and constructing power lines.

/s/ GLENN A. COUGHLAN,

/s/ THOMAS B. PAYNE,

Attorneys for Appellants.

[Endorsed]: Filed September 8, 1955.

[Title of District Court and Cause.]

AFFIDAVIT OF MAILING

State of Idaho,
County of Ada—ss.

Aurrel Coughlan, being first duly sworn, deposes and says:

That she is over the age of twenty-one and resides in Boise, Idaho, and is employed as secretary in the office of Glenn A. Coughlan, Attorney at law; that there is a United States Post Office located in the respective towns mentioned hereafter; that there is a daily mail service between Boise, Idaho, and said places.

That the affiant on the 8th day of September, 1955, served copies of the attached Notice of Appeal, Designation of Contents of Record on Appeal and Statement of Points on Which Appellants Intend to Rely on Appeal by enclosing copies of said Notice of Appeal, Designation of Contents of Record on Appeal and Statement of Points on Which Appellants Intend to Rely on Appeal in an envelope properly addressed to:

McNaughton & Sanderson, Attorneys at Law,
Wigget Building, Coeur d'Alene, Idaho;

Paine, Lowe, Coffin, Ennis and Herman, attorneys at law, 602 Spokane & Eastern Bldg.,
Spokane 5, Washington,

with the proper postage thereon, and deposited the same in the United States Post Office in Boise, Idaho.

/s/ AURREL COUGHLAN.

Subscribed and Sworn to before me this 8th day of September, 1955.

[Seal] /s/ GLENN A. COUGHLAN,
 U. S. Commissioner for Idaho,
 Residing at Boise, Idaho.

[Endorsed]: Filed September 8, 1955.

[Title of District Court and Cause.]

File No. 1999

DEPOSITION OF ED F. RAUNIG

Be it remembered, that the Deposition of Ed F. Raunig, the witness above named, came on regularly for hearing before me, R. L. Roberston, a Notary Public for the State of Montana, in my office on the third floor of the Cascade County Court House in the City of Great Falls, Montana, on the 8th day of January, 1955, at the hour of 2:00 p.m. of said day, pursuant to the Notice to Take Deposition Upon Oral Examination on file in said cause, a copy of which said Notice is hereto annexed. The Plaintiffs were represented by their counsel, Thomas Payne, Esq., attorney-at-law of Wallace, Idaho, and Glenn A. Coughlan, Esq., attorney-at-law of Boise, Idaho, and the defendant was represented by its counsel, Alan P. O'Kelly, Esq., attorney-at-law of the firm of Paine, Lowe, Coffin, Ennis & Herman of Spokane, Washington, and the following proceedings were had, to wit:

(Deposition of Ed. F. Raunig.)

Mr. Coughlan: Mr. O'Kelly, I presume that it may be stipulated that this Deposition that we are about to take may be used in either or both of the cases, Beedy vs. Washington Water Power, File 1999, and Inman vs. Washington Water Power, File No. 2000, and that the deposition may be used at the trial as provided for in the Federal Rules, and in particular Rule 26?

Mr. O'Kelly: It is so stipulated.

MR. ED F. RAUNIG

being called as a witness in behalf of the Plaintiffs, and being first duly sworn, testified as follows:

Direct Examination

By Mr. Coughlan:

Q. Will you please state your name, sir?

A. Ed Raunig.

Q. Where do you reside? A. Great Falls.

Q. Montana? A. Great Falls, Montana.

Q. And what is your position of employment, Mr. Raunig?

A. Superintendent of the Lewis Construction Company.

Q. How long have you been so employed?

A. About ten years.

Q. Were you so employed on July 11, 1954?

A. Yes, sir. [2*]

Q. And are still so employed? A. Yes, sir.

*Page numbering appearing at foot of page of original Reporter's Transcript of Record.

(Deposition of Ed. F. Raunig.)

Q. Will you just briefly describe the nature of your employment, Mr. Raunig? What do you do for the company?

A. I supervise all our crews, our lines crews. I have a foreman under me, but I supervise.

Q. And what is the general nature of your work?

A. Power line maintenance and construction.

Q. Now, what was the Lewis Construction Company employment on the 11th of July, 1954?

A. The 11th of July?

Q. Yes.

A. Was that the day of the accident?

Q. Yes, but what I had in mind is your general job at that time.

A. Well, we had one job in Idaho for the Washington Water Power Company.

Q. And what was the nature of that job?

A. We were replacing crossarm insulators and replacing conductors on a line from Government Gulch, Idaho, to Burke, Idaho.

Q. Was there a written contract with Washington Water Power, Mr. Raunig?

A. Yes, there was.

Mr. Coughlan: I wonder, Mr. O'Kelly, if we might have this marked and introduced and substitute a copy of it?

Mr. O'Kelly: That is satisfactory with me.

Q. Mr. Raunig, handing you Plaintiffs' Exhibit No. 1 for [3] identification, will you just generally state what that is?

(Deposition of Ed. F. Raunig.)

A. That is the contract between The Washington Water Power Company and the Lewis Construction Company.

Q. And is it signed by you?

A. Yes, it is signed by me.

Q. And it is signed by some representative in behalf of Washington Water Power?

A. Yes, it is.

Mr. Coughlan: We would now offer Plaintiffs' Exhibit 1 for identification in evidence, and I understand a copy may be identified and substituted in its place?

Mr. O'Kelly: There is no objection to substituting a copy, subject to a check against the original.

Q. Then, handing you the copy marked Plaintiffs' Exhibit 1, Mr. Raunig, is that a copy of the original contract, of the original agreement between your company and Washington Water Power?

A. Yes, it is.

Mr. Coughlan: And we now offer a copy of Plaintiffs' Exhibit 1 in evidence.

Mr. O'Kelly: No objection.

Q. Mr. Raunig, where were you working on the 11th of July, 1954?

A. Is that the day of the accident?

Q. Yes.

A. We were—well, I had crews scattered all over, but the crews involved in this accident was working approximately two miles Northwest of Wallace. [4]

Q. And who was present in this particular crew?

(Deposition of Ed. F. Raunig.)

A. Well, I really don't know all the names any-more because we had so many strange men there all the time.

Q. To refresh your memory, was Mr. George Beedy a member of that crew? A. Yes, sir.

Q. And Mr. Jack Inman, was he present also?

A. Yes, he was.

Q. And Mr. Reuben Brown, was he also there?

A. Yes, sir.

Q. Mr. Bill Eliopolous? A. Yes.

Q. And Cliff Laughry, was he also there, Mr. Raunig? A. Yes, I believe he was.

Q. And you were also present? A. No, sir.

Q. Where were you at that time?

A. I was approximately three miles away on a line, but about eight miles away by road.

Q. Had you been there at any time during that day? A. Yes, I was.

Q. Approximately when was that?

A. I was there about two hours previous to the accident.

Q. And what type of work was being done at that time? A. They were sagging wire.

Q. Between what points?

A. Between Station 104 and Station 116.

Q. Now, could you just generally describe the nature of the terrain there at that place, Mr. Raunig?

A. Well, it was a pretty steep slope from 104 to 116, and pretty brushy. [5]

Q. And were you stringing wire on power poles

(Deposition of Ed. F. Raunig.)

between these two stations? Is that what you were doing?

A. The wire was already strung. We were sagging it, or tightening it.

Q. That is preliminary to putting it in in final place, is that correct? A. Yes.

Q. Now, what was the manner in which this sagging was being done?

A. Well, you take a winch truck and you run your winch up the pole and through a pulley, or what we call a "snatch block," and then it is fastened onto the conductor with what we call a "grip," and the lineman reaches out from the pole and gets it out for approximately three feet.

Q. Then, if I understand you correctly, you had a winch on a truck there? A. Yes, sir.

Q. And the winch is located in the back of the truck, is that right?

A. Yes, sir, back of the cab. The winch itself is mounted right back of the cab.

Q. And the line is hooked onto the winch after it runs through this pulley, is that correct?

A. Well, the line is wrapped around the winch drum then, and we send up the pole through a snatch block onto a grip and the grip fastens onto the wire.

Q. Now, the lines then were being tightened and released by means of this winch, is that correct?

A. Pulled up. [6]

Q. Pulled up by means of the winch?

A. By means of the winch.

(Deposition of Ed. F. Raunig.)

Q. Now, the line there at that place which you were sagging runs—your truck with the winch on it was sitting on the top of the hill, was it not?

A. Yes.

Q. And the line ran down into the valley, is that correct, the transmission line which you were sagging?

A. Both ways from this ridge.

Q. It ran both ways?

A. Yes.

Q. And was it attached then on the other side of the valley? The line, I mean?

A. Which end do you refer to?

Q. Then end of the line which crossed another power line.

A. It was already attached to a pole, yes.

Q. And was there a power line which ran beneath the line which you were sagging?

A. Yes, sir.

Q. And which direction, generally, if you know, did that line run?

A. Well, I can't tell directions there. I mean, I wouldn't know directions, but it went just a square crossing underneath.

Q. At right angles?

A. At right angles.

Q. And was that at the bottom of the valley, approximately?

A. It was not exactly in the bottom. There was another station below it. [7]

Q. Now, the line that was running at right angles to the line which you were sagging, is that a line which runs up a gulch known as Nine-Mile Gulch?

A. Yes.

(Deposition of Ed. F. Raunig.)

Q. And do you know who owns that line?

A. Well, I believe The Washington Water Power Company owns it.

Q. And do you know what the voltage of that line is?

A. I was informed it was 13,000 volts.

Q. And was it energized at the time you were doing this work?

A. Yes, sir.

Q. Now, prior to the making of the crossing where Mr. Beedy was killed, had you contacted anyone with respect to de-energizing this line running up Nine-Mile Gulch?

A. Yes, I did. Just in a matter of form I asked them if there was any chance.

Q. And who did you contact with reference to that?

A. I talked to Mr. Hammar and also Mr. Thompson. Just as a matter of form I asked him.

Mr. O'Kelly: Could we place the time and place of the accident better?

Q. When did you make this request, or these requests, to the best of your recollection?

A. Well, I imagine a couple days before we got to this point.

Q. Now, where did you talk to these gentlemen about this?

A. Well, if I recall right, I talked to Mr. Hammar out [8] on the job somewhere, and then I met Mr. Thompson on the street, but I had been informed before that it could not be killed, but as a matter of form I always ask if there would be any changes.

(Deposition of Ed. F. Raunig.)

Q. Now, will you identify Mr. Hammar. Who is he?

A. He was the inspector for The Washington Water Power.

Q. Do you know his first name? Is it Sam Hammar? A. Yes, it is.

Q. And will you identify Mr. Thompson? Who is he?

A. He is the manager of The Washington Water Power in Wallace.

Q. Now, had you made other requests along that line, for them to kill the lines, prior to this time?

A. Well, we talked about it and there was some lines that only involved one customer, or where they had a loop feed—in other words, where they could kill a section of the line and still feed the customer. Then we killed the line.

Q. Would you say, then, that there had been several requests prior to this occurrence on July 11, 1954?

Mr. O'Kelly: I think you are kind of leading the witness. I think you can ask him how many requests or something like that.

Mr. Coughlan: Well, I will withdraw it.

Q. How many requests did you make prior to July 11, 1954, that lines be killed, Mr. Raunig?

A. Well, I wouldn't know, because just in the process of the work we would talk about if there was any chance of killing it, and Washington Water Power Company would try to get a kill if they

(Deposition of Ed. F. Raunig.)

could. In [9] fact, they made me out a slip and wrote down whatever crossings they could kill and what crossings we would have to guard and protect their lines.

Q. Now, did you make any additional, special effort to have the line killed where the crossing was to be made when the accident occurred?

A. No, we didn't make no special effort.

Q. Did you go with anyone to discuss the matter with any other persons?

A. Not on that crossing.

Q. On prior crossings had you? A. No.

Q. Did you go to any of the mine owners at any time? A. Not prior, but after.

Q. Afterwards you did. Did you offer to do this work in any particular way, Mr. Raunig, in consideration of having the lines killed? A. No.

Q. Did you ever state to the Power Company officials that you would work at night or early in the morning if they would make a kill on the line?

Mr. O'Kelly: It is a leading question.

A. No.

Q. Mr. Raunig, were there any employees or officials of The Washington Water Power present and inspecting the work on this job as you went along?

A. They had Mr. Hammar there for inspector and he was inspecting so he would do it according to spec, not the way you done it.

Q. And he was then on the job all the time, is that correct? [10]

(Deposition of Ed. F. Raunig.)

A. Well, he was somewhere up and down the line all the time. We had four or five crews along the line and he couldn't be with every crew at all times.

Q. Was there anyone else there from the Power Company besides Mr. Hammar?

A. Not on the job all the time.

Q. Now, what occurred there on the 11th of July, 1954, by way of an accident?

A. What do you mean? You mean what caused the accident?

Q. Well, yes, what happened?

A. I wouldn't know. I wasn't there. All mine was hearsay.

Q. Did you subsequently come back to the location?

A. Yes.

Q. And what did you observe when you got back there, Mr. Raunig?

A. Well, when I got up to the hill, why, this one man was—they was still working on him.

Q. Which man was that?

A. Beedy. They were still working on him. The fire department and the police department was up there, and the sheriff, and our men were working on him also, and Inman had already been taken to the hospital.

Q. Was Mr. Beedy dead at that time, when you got back?

A. Well, I wouldn't know. They were still working on him and they worked on him, I would say, an hour after I was there. After the doctor

(Deposition of Ed. F. Raunig.)

and the firemen gave up, our boys still wouldn't give up.

Q. You don't know then whether Mr. Beedy died or not? [11]

A. Yes, I know. That is, I know he died, but I wouldn't know if he was dead when I got there.

Q. He died shortly after, then, at any rate, is that correct?

A. Well, all I know is finally the sheriff said—and the coroner was there—that there was no use working on him any more, that he was dead.

Q. Now subsequent to the occurrence on July 11, 1954, did you make other crossings over Washington Water Power lines?

A. Yes, we did.

Q. And were there kills made on those?

A. On some, and some not.

Q. Mr. Raunig, do you recall making a statement with regard to this occurrence?

Mr. O'Kelly: I object to the form of that question. It is leading. It is cross-examination of your own witness.

Q. Well, this is for purposes of refreshing your memory, Mr. Raunig. Did you make and sign a statement concerning this matter to me?

A. Yes.

Q. Mr. Raunig, I hand you a statement written here. Is that signed by you; is that your signature?

A. Yes, it is.

Q. Now, referring to the second page of that, concerning——

(Deposition of Ed. F. Raunig.)

Mr. O'Kelly: I am going to object to this form of questioning. I don't know what is on there or what you are leading up to, but he is your witness and I think he should be asked definite questions and [12] not cross-examined at this time.

Q. Well, Mr. Raunig, did you ever make the statement that you talked with mine owners and Power Company officials to get clearance to shut down; that you did that on all crossings? "We asked if we could do it in the early morning or late at night." Do you recall that statement?

Mr. O'Kelly: I still don't see the purpose of that. I don't feel it is proper questioning.

Mr. Coughlan: You may answer. That will be taken care of later.

Mr. O'Kelly: If you want to, go ahead and answer it. That is all right.

A. We talked to some, yes.

Q. And you made the request if you could do it early in the morning or late at night?

A. It didn't seem to make any difference to those mines. The water problem, that was their big problem, so you didn't do any good, whether you wanted to do it in the morning or any other time.

Q. Yes, but what I am getting at is you made the request? A. Yes.

Q. Now, along that line, did you offer to make any other arrangements for making these crossings if they would shut down, such as to time and pay of your men? A. I don't remember.

Q. Did you ever tell them that, or ask them, that

(Deposition of Ed. F. Raunig.)

if they would close at three in the morning you would pay your men double?

Mr. O'Kelly: Object to that question. It is [13] leading and it is cross-examination.

Q. Well, I will ask you then, Mr. Raunig, if that statement appears in the statement that you have made?

Mr. O'Kelly: I object to that, too. I don't think that is proper questioning. It is still cross-examination of your witness. If he wants to read the statement and then testify, I have no objection to using it to refresh his recollection, but I don't think he should be cross-examined about a statement secured by you, and on direct examination.

Q. Well, let me rephrase that question. Did you offer to make any special arrangements of any kind in consideration of their shutting off their power on these lines you were crossing?

A. I believe we did on some, but not on this one involved here.

Q. What special arrangements were those that you offered to make?

A. We just talked whether we could do it in the morning, and it didn't make any difference to the mines or any of the customers whether it was in the morning, and it didn't make any difference to the power off.

Q. But did you offer any other thing besides what you have said, with respect to the pay of your men?

(Deposition of Ed. F. Raunig.)

A. Well, if we would work nights, naturally we would have to pay double time.

Q. I presume your answer, then, is that that was your offer?

Mr. O'Kelly: Well, I think he answered the question. [14]

A. Not on this crossing.

Q. On other crossings?

A. Not prior to this. We did make some after that, on double time.

Mr. Coughlan: That is all. You may examine.

Cross-Examination

By Mr. O'Kelly:

Q. Mr. Raunig, prior to bidding this job, did you have any discussion with Washington Water Power Company officials relative to whether these crossings were to be worked hot or be "killed," as you term it?

A. The first time that I ever met Mr. George and Mr. Gamble, that was the first day I went over to look at the job, and they took me over the job and took me to all these crossings, and they told me that every one of these crossings would have to be made hot. I mean, I was informed at that time that every crossing would have to be considered hot, that we would have to make them hot and we should figure the job accordingly, and they also definitely took me up to this one crossing, because it was right on a nice road. In fact, they took me to most of them,

(Deposition of Ed. F. Raunig.)

but I was informed that all the crossings would have to be made hot the first time I ever looked at the job.

Q. And your bid was made on that basis, was it?

A. Yes, sir.

Q. Was any discussion ever had prior to starting the job as to de-energizing any of the crossings?

A. What was that?

Q. Prior to starting the job did you have any discussion [15] relating to killing the line, or de-energizing it? A. No.

Q. When was the first discussion had relative to killing any crossings?

A. Well, after we had started the job, as we went along I was informed that with the progress of the job, which was very slow, if there was any that they could possibly kill they would kill them to help us that much.

Q. About that time did you have a discussion with several representatives of The Washington Water Power Company as to which lines could or could not be killed?

A. Yes, and they made——

Q. Who was present at that discussion, do you remember?

A. Mr. Hammar and Mr. Thompson.

Q. Was Mr. George there?

A. And Mr. George.

Q. Any others that you remember?

A. I wouldn't know for sure if Mr. Gamble was there or not.

(Deposition of Ed. F. Raunig.)

Q. Was a Mr. Berquist there, by any chance?

A. Yes, he was.

Q. And at that time did you go through all the crossings that you had left to do?

A. Yes. We have what we call a "work sheet." Every station is numbered and on this work sheet it would tell what crossing is a 13,000 volt crossing or a 2,300 volt crossing or a 7,200 volt crossing, and at that time we wrote down "guard." That meant to guard it, that you couldn't kill it, and on the next one [16] they would write "kill," and all the way down on this work sheet.

Q. And what did this work sheet show as to this Nine-Mile crossing involved in this accident?

Mr. Coughlan: Well, now, just a moment. We object to the witness testifying about some document that is not here in evidence, and as to what it contains, on the basis that his testimony would not be the best evidence. The document would be the best evidence.

Q. Do you have that document, Mr. Raunig?

A. No, I don't.

Q. Is that document still in existence, do you know?

A. I wouldn't know for sure.

Q. Do you know where it is?

A. Well, I believe I either destroyed it or I know yet where it is. It is either destroyed or it would be in some of my files.

Q. At the discussion you had at that time, was it stated whether or not this Nine-Mile crossing was to be worked hot or was to be killed?

(Deposition of Ed. F. Raunig.)

Mr. Coughlan: Well, now, just a second. Would you fix the time and place of this particular discussion?

Q. Could you remember about when—the time and place where this conversation took place that we are discussing?

A. Well, I believe we were just out on the job somewhere, after we had worked approximately three weeks, and this discussion took place right out on the job. [17]

Q. It wasn't in Wallace at the manager's office at the Water Power Company, or do you remember for sure?

A. I don't remember for sure.

Q. But you know there was a conference which took place two or three weeks after the job started, to the best of your recollection?

A. Yes. That is the time we went through all the crossings. That is, we went over all the crossings, the discussion about all the crossings, and I was told which definitely could not be killed and which could be killed and which might be killed.

Q. And what was the discussion relative to the Nine-Mile crossing?

A. That one crossing was definitely stated it could not be killed.

Q. You speak of erecting guards at crossings that were to be worked hot. Would you explain what a guard is?

A. Well, there is different types of guard structures. You can put up two poles with an arm across it, or you can put up four poles, two poles on each

(Deposition of Ed. F. Raunig.)

side of this crossing with an arm across, and then again you can use a single pole and hang blocks up on this single pole.

Q. Whenever you would work a crossing hot, you would put a guard structure on it, is that correct? A. Yes.

Q. And if you worked it when it was killed or not energized, then you would not put a guard structure on it, is that correct?

A. That's right. [18]

Q. Did you have a guard structure at this Nine-Mile crossing? A. Yes.

Q. Was that guard structure in use at the time of the accident? A. No, sir.

Q. Can you explain why the guard structure was not in use at that time?

Mr. Coughlan: Now, just a moment. Just for the purpose of the record, we object to this line of questioning on the ground that it is not proper cross-examination, not having been covered in anywise on direct.

Mr. O'Kelly: I think the direct was broad enough to cover it. You may go ahead and answer it, subject to the objection.

Mr. Payne: I object to that also on the ground that Mr. Raunig was not even present at the time, as he testified in the direct. He hadn't been present there for approximately two hours before, so would he actually know if it was in use or not then, or anything else?

(Deposition of Ed. F. Raunig.)

Q. Well, do you know it was not in use, Mr. Raunig? A. Yes, sir.

Q. Was it away from the guard at the time you saw it about two hours before the accident? Was it out of the guard?

A. Yes, sir. The wire was already pulled in and as we started to pull this wire in, after we had set the guard structure, the wire would not come down to [19] this guard structure. It stayed up in the air around twenty or twenty-five feet above the guard structure, and we figured that the big risk of getting to the 13,000 was over after the wire was pulled in.

Q. You were in general charge of that work, is that correct? A. Yes.

Q. And do you know of your own knowledge it was not in the guard structure at the time?

A. Yes, sir, I know it was not.

Q. Who determined what type of guard structure was to be used at any crossing? A. I did.

Q. Who determined whether the guard structure should be used or would be used in a particular manner?

Mr. Coughlan: We object to this line of questioning upon the ground it is not proper cross-examination, not covered on direct.

Q. You may answer the question.

A. I did.

Q. You stated on direct that you asked as a matter of form to have this particular line de-energized. Will you state where and when this formal request was made?

(Deposition of Ed. F. Raunig.)

A. Well, just on the job.

Q. Or did you make a formal request? Let's put it that way. Did you make a formal request to de-energize that line?

A. I didn't make a request to de-energize it. I asked them if—I said, "I know I am supposed to make this [20] crossing hot, but is there any changes, any chance of getting it killed." I didn't actually say I wanted it.

Q. About what time of the day did this accident occur, did you state, or do you remember? Was it in the forenoon, around noon, or the afternoon, if you remember?

A. I believe it was right after lunch.

Q. You stated that you had completed pulling the wire through, or this sagging, at this time. Which part of the operation, the pulling or the sagging, is considered to be the dangerous part of the operation?

A. Well, I would consider the pulling in.

Q. As being the more dangerous?

A. Yes.

Q. About how long did it take you to make this crossing, including both pulling and sagging?

A. To complete the pulling in and the sagging would take from twelve to thirteen hours.

Q. Do you remember whether that is the amount of time that was taken on this one, or is that just a guess on your part?

A. No, I figured it took us about seven—I believe about seven hours to pull the wire in, and it

(Deposition of Ed. F. Raunig.)

usually takes us around four to five hours to sag that amount of wire.

Q. You haven't referred to your records lately to know exactly how much time was taken on this particular crossing? A. No. [21]

Q. So that your answer at this time is just your best estimate at this time, is that correct?

A. Yes, I believe it is pretty close.

Mr. O'Kelly: That is all.

Redirect Examination

By Mr. Coughlan:

Q. Mr. Raunig, do you know what caused the accident that morning?

A. No, I don't. I don't honestly know.

Q. Do you have an opinion about it?

Mr. O'Kelly: Well, if this is a deposition for the introduction, for the purpose of introduction at the trial, I think you would have to build a foundation for any opinion. I object to the form of the question.

Q. Well, Mr. Raunig, how many years have you been engaged in the electrical pole line construction work? A. 27 years.

Q. And is that generally the type of work you were doing on this job for the Washington Water Power? A. Yes.

Q. And you have been a superintendent for a number of those years, have you? A. Yes.

Q. How many?

(Deposition of Ed. F. Raunig.)

A. Oh, I would say about eight.

Q. And it is your job to supervise the crews, is it, that do this kind of work? A. Yes.

Q. And they are generally under your supervision? [22] A. Yes.

Q. Now, then, will you state whether or not you have an opinion as to what caused the accident on July the 11th, 1954, where Mr. Beedy lost his life?

Mr. O'Kelly: I still object on the ground there is no basis laid or foundation laid for any opinion. I will grant Mr. Raunig's qualifications, but that doesn't lay a foundation for an opinion question.

Q. Mr. Raunig, further enlarging, did you make an investigation following the accident?

A. Yes, we did, but in a case like that you just can't determine exactly what caused the accident.

Q. You made such an investigation?

A. Yes.

Q. And what did your investigation reveal?

A. Well, I could never tell honestly what caused it.

Q. Did you examine the place where the power line you were sagging crossed the line running up Nine-Mile Gulch? A. Yes.

Q. And what did you observe there, Mr. Raunig?

A. Just observed the burned spot on the wire.

Q. On both wires?

A. On this one wire, this new wire.

Q. That you were sagging, is that correct?

A. Yes.

(Deposition of Ed. F. Raunig.)

Q. And would that be at the place where it made the crossing?

A. Where it made contact with the 13,000.

Q. Mr. Raunig, following the examination there of the place where the two wires crossed, and observing the [23] burns on the wire there, do you think that had any connection with the accident?

A. Yes.

Q. You believe that was the result of the accident, the cause of the accident?

A. Well, where it made contact, yes.

Mr. Coughlan: That is all.

Recross-Examination

By Mr. O'Kelly:

Q. I don't know whether I asked this or not: If the wires had been in this guard structure at the time of the accident, could the accident have happened?

A. I don't believe so.

Mr. O'Kelly: That is all.

Mr. Coughlan: Just for the purpose of the record, I would like to move that the last answer be stricken for the purpose of objection, and then object to the question upon the ground that it is improper cross-examination, not having been covered in anywise on direct. That is all.

(Witness excused.)

/s/ ED. F. RAUNIG.

(Deposition of Ed. F. Raunig.)

Subscribed and sworn to before me this 11th day of January, 1955.

[Seal] /s/ R. L. ROBERTSON,

Notary Public for the State of Montana, Residing
at Great Falls, Montana.

My commission expires April 4, 1955. [24]

State of Montana,
County of Cascade—ss.

I, R. L. Robertson, a Notary Public for the County of Cascade, State of Montana, do hereby certify that Ed F. Raunig was by me first duly sworn to testify the whole truth, and that the above deposition by him signed was recorded stenographically by me personally and by me reduced to type-writing.

I Further Certify, That the said deposition was examined and read over by said deponent and was signed by said deponent in my presence and that the said deposition constitutes a true record of the testimony given by said witness.

I Further Certify, That the said deposition was taken at the time and place specified in the annexed copy of Notice of Taking Deposition, and that the taking of the said deposition commenced on the 8th day of January, 1955, at 2:00 o'clock p.m. and was completed at 3:00 o'clock p.m. on the afternoon of said day.

(Deposition of Ed. F. Raunig.)

I Further Certify, That Thomas Payne of Wallace, Idaho, and Glenn A. Coughlan of Boise, Idaho, appeared as attorneys for the plaintiffs, and that Alan P. O'Kelly of Spokane, Washington, appeared as attorney for the defendant, and that each were present during the entire examination.

I Further Certify, That I am not an attorney or counsel for any of the parties, nor a relative or employee of any attorney or counsel connected with the action, nor am I financially interested in the same.

Dated this 11th day of January, 1955.

[Seal] /s/ R. L. ROBERTSON,
Notary Public for the State of Montana, Residing
at Great Falls, Montana.

My commission expires April 4, 1955.

[Endorsed]: Filed January 14, 1955.

[Title of District Court and Cause.]

DEPOSITION OF JACK P. INMAN

Appearances:

GLENN A. COUGHLAN,
Attorney at Law, and
THOMAS B. PAYNE,
Attorney at Law,

Appearing on Behalf of the Plaintiffs.

(Deposition of Jack P. Inman.)

ALAN P. O'KELLY,

Attorney at Law,

Appearing on Behalf of the Defendant.

(Whereupon, at ten o'clock, a.m., the above-entitled matter came on pursuant to stipulation of the parties for the taking of the Pretrial Deposition of Jack P. Inman before Oren J. Casey, Certified Shorthand Reporter, and a Notary Public.)

Mr. O'Kelly: This deposition of Jack Inman—is that your full name?

The Witness: Yes.

Mr. O'Kelly: Is being taken on stipulation of the parties at this time and place under the Rules of Federal Court in connection with the case of Guenith Opal Beedy and Cynthia Guen Beedy, by his next friend, Guenith Opal Beedy, versus The Washington Water Power Company, a corporation. It is stipulated that the deposition may be taken at this time and place?

Mr. Coughlan: It is agreeable.

JACK P. INMAN

called as an adverse witness on behalf of the defendant, being duly sworn, testified as follows:

Cross-Examination

By Mr. O'Kelly:

Q. Will you state your name, please?

A. Jack P. Inman.

(Deposition of Jack P. Inman.)

Q. And your address?

A. 6905 East 6th, Spokane, Washington.

Q. What is your occupation, Mr. Inman?

A. Equipment operator, high lines.

Q. What does that involve; what sort of work is that?

A. Well, stringing wire, sagging wire, building roads, digging pole holes with mechanical equipment. [2*]

Q. For whom do you work? A. Pardon?

Q. And for whom do you work—do this kind of work? A. Different contractors.

Q. In other words, you work for contractors who are in the business of building transmission lines for electric power companies? A. Yes.

Q. And how long have you been in that business?

A. Four years this last time, I think—that is approximate.

Q. About when did you start?

A. About 1951 with high lines.

Q. Were you doing something different with electricity before that—electrical construction, rather?

A. No, I had worked telephone before that.

Q. Have you participated in the construction of very many high lines or what is the extent of your experience?

A. Well, I have been working quite steady for the last four years up until last winter.

Q. Have you worked for various contractors?

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Deposition of Jack P. Inman.)

A. Yes.

Q. Have you worked on lines for different power companies, too?

A. Yes. [3]

Q. Which power companies?

A. Bonneville, Washington Water Power, REA. That would be it.

Q. About July 1st, 1954, for whom were you working?

A. Lewis Construction Company.

Q. And what were you doing at that time?

A. I was hired out through the union hall as an operator.

Q. What does an operator do?

A. Runs heavy equipment or winch trucks—boom trucks. As I stated before—anything that has to do with operating their equipment that they have on the line.

Q. What sort of work was the Lewis Construction Company doing?

A. Line work.

Q. For whom?

A. For Washington Water Power.

Q. About when did this job start?

A. About May the 12th.

Q. And you worked for Lewis Construction Company on this line from May 12th until when?

A. July 11th.

Q. On or about July 1st were you involved in an accident on the line?

A. I don't think it was the 1st; I think it was the 2nd or 3rd. It was about the 3rd. [4]

Q. What day of the week was it?

(Deposition of Jack P. Inman.)

A. Friday.

Q. Let's see, in 1954, what date did you say the accident was?

A. The one on the 1st of July; is that the one you are referring to?

Mr. Coughlan: I would like to straighten that out.

Mr. O'Kelly: I was following the pleading.

Mr. Coughlan: I made a mistake. I hope it was a typographical one. That should be "July 11th" instead of "July 1."

Mr. O'Kelly: July 11th, that is right.

Mr. Coughlan: I believe it can be stipulated that the correct date may be placed in there.

Mr. O'Kelly: Yes, change that to the 11th. Were you involved in an accident on or about July 11th?

A. Yes.

Q. What day of the week was that?

A. Sunday.

Q. And will you state in your own words what happened at that time?

A. We were sagging wire and we pulled it in with the winch as far as we could and it lacked just a little bit of coming to sag so we put coffin hoist on the line and was pulling it in with a coffin hoist and the line went down and [5] hit the 13,000.

Q. Let's define some of these terms. What do you mean by "sagging wire"? Will you explain that?

A. Pulling it up in the air to the correct height and the correct strain between structures.

(Deposition of Jack P. Inman.)

Q. Were you trying to get it to the correct strain in the direction of the 13,000 that it went into or the other direction? A. (No response.)

Q. Possibly you could do better if you would just draw a picture of it.

A. This is our reel setup back here. And we had strung this wire through.

Q. Do you want to label that "1"?

A. Strung this wire through to our pickups, No. 2.

Q. No. 2?

A. We went back to sag. Approximately half way; it wasn't quite half way.

Q. That is position 3, is it?

A. It is on top of the hill, a 3-pole, dead-end structure, and had the truck out here and was sagging this part of the line.

Q. That is, between 1 and 3?

A. Between 1 and 3.

Q. The truck is No. 4? [6]

A. Uh-huh. This 13,000 runs approximately north and south that we were crossing over it.

Q. Do you want to make that "5"—the 13,000? So you were bringing the wire to proper tension between positions Nos. 1 and 3, working with the truck at position No. 4, and in pulling the line up between 1 and 3 it let it down between 4 and 2?

A. 2, which was the reel.

Q. Which dropped the line into No. 5?

A. No. 5.

(Deposition of Jack P. Inman.)

Q. Was there a guard structure of any kind located at—was it near position 5?

A. There was a guard structure there. But they did not have the wire in the travelers on the guard structure.

Q. Had they used the guard structure at all in this operation? A. No.

Q. Did they use it in stringing the wire?

A. No.

Q. They didn't ever put in into the guard structure at all?

A. Not previous to the time of the accident they didn't.

Q. You mean they strung that wire without even putting it into the guard structure?

A. Yes. [7]

Q. What did they build a guard structure there for? A. I don't know.

Q. When did they do the stringing on this work, do you remember?

A. I believe it was on Wednesday and Thursday.

Q. At the time you were working on this, did you know whether the 13,000 was dead or hot?

A. No, we didn't know. We presumed that it was dead.

Q. You presumed that it was dead—

A. We didn't know.

Q. —Wednesday and Thursday and Sunday?

A. We didn't know whether.

(Deposition of Jack P. Inman.)

Q. You didn't know whether it was dead or hot? A. No.

Q. When you went on the job was there any understanding as to whether the crossings were to be worked hot or dead?

Mr. Coughlan: Now, just a minute.

Q. (By Mr. O'Kelly): That you knew of?

A. No.

Mr. Coughlan: Just a minute before you answer. Let me get an objection on the answer and then you can answer. We object to the question as calling for a conclusion as to what this witness' understanding might have been and upon the further ground that it is irrelevant, immaterial and [8] incompetent. Will you put that objection in before the answer? I think he answered it before I got a chance to object.

Q. (By Mr. O'Kelly): Were you told or instructed at any time as to whether crossings were made hot or cold or dead?

Mr. Coughlan: Just a minute.

The Witness: Not to my knowledge.

Mr. Coughlan: Just a minute, again.

The Witness: Not to my knowledge.

Mr. O'Kelly: Whether it is irrelevant is reserved until the time of trial. You may object as to whether the question is in the proper form. What was your answer?

A. Not to my knowledge.

Q. Generally when you work for other con-

(Deposition of Jack P. Inman.)

tractors, are you advised when you are making a hot crossing or when you are making a dead crossing?

Mr. Coughlan: Just a minute. To that we object as being incompetent, irrelevant and immaterial.

Q. (By Mr. O'Kelly): You can go ahead and answer now.

A. Not to my knowledge.

Q. Do you ever make crossings without guard structures installed of any kind?

Mr. Coughlan: Same objection. [9]

The Witness: Do you mean, have we ever?

Q. (By Mr. O'Kelly): Have you ever participated in the making of a crossing where no guard structure of any kind was installed? A. Yes.

Q. Had you on this job? A. Yes.

Q. Did you know why there were guard structures installed in some crossings and not in others?

Mr. Coughlan: We object as being incompetent, irrelevant and immaterial.

The Witness: Assume—assume when you install a guard structure the line is hot.

Q. (By Mr. O'Kelly): When you don't install a guard structure the line is dead?

A. That is the general procedure.

Q. That is the general procedure. You knew that a guard structure was installed here?

A. Yes.

Q. Did you assume that the line was hot or dead?

A. I would assume it was dead, because the wire was not in the travelers.

(Deposition of Jack P. Inman.)

Q. Was never in the travelers at any time, is that your statement? [10]

A. It was never in the travelers at any time prior to the accident.

Q. It was not in the travelers when they strung the wire or at any time prior to the accident, is that correct? A. No.

Q. Did they advise you why they built a guard structure?

A. They don't advise the men working. They might tell the foreman why they built a guard structure.

Q. Who were the other workmen working with you at that time?

A. Leo Pinelli was foreman. Hoot Brown was the lineman. George Beedy was a lineman. Cliff Laughary was an operator. Bill Eliopulos was an operator operating the truck at the time. I was an operator assigned to the sagging crew for that day.

Q. Just prior to this accident, do you remember whether Mr. Brown said anything to the foreman about the line being in the travelers?

A. I believe Hoot asked if the line was in the clear.

Q. If the line was in the clear. What do you mean by "in the clear"?

A. If it would get into the 13,000; in other words, if it was clearing.

Q. What did the foreman say?

A. "Yes, it is in the clear." [11]

Q. Did he make any other suggestions?

(Deposition of Jack P. Inman.)

A. Not to my knowledge.

Q. In your work generally have you made many hot line crossings?

Mr. Coughlan: We object on that, irrelevant and immaterial. Go ahead and answer.

The Witness: Well, if the occasion comes up we make a hot line crossing.

Q. (By Mr. O'Kelly): You have made hot line crossings for other people besides the Washington Water Power, haven't you? A. No.

Q. Never have?

A. No—now, I will take that back. Yes; Bonneville.

Q. Made them for Bonneville. What do you do when you make a hot line crossing—build a guard structure?

A. Build a guard structure—adequate guard structure.

Q. With an adequate guard structure there is nothing particularly dangerous about making that sort of a crossing, is there?

Mr. Coughlan: Well, now, let's see; we object to that—calling for a conclusion, improper examination of this witness. He is not qualified. There is no proper foundation been laid for that type of question. [12]

Q. (By Mr. O'Kelly): Do you want to answer it now?

A. Well, all work—no line work is safe, I will put it that way.

(Deposition of Jack P. Inman.)

Q. This is just within the ordinary course of that type of work, is that correct?

(No response.)

Q. In other words, all line work——

A. ——it is hazardous.

Q. ——it is hazardous? A. Yes.

Q. And making a hot line crossing is not particularly any more dangerous than many other things you do, is that correct? A. Yes, it is.

Q. It is more dangerous? A. Yes.

Q. Of anything else you do or most anything else you do?

A. I would say most anything else.

Q. Is it dangerous if you have an adequate guard structure?

A. Not as much so as if you don't use a guard structure.

Q. Wasn't that the purpose of the guard structure—to make it safe so it won't——

A. It is the purpose of a guard structure to make it [13] comparatively safe, yes.

Q. If the line had been in the guard structure on this particular day, would the accident have happened?

Mr. Coughlan: Just a moment. We object to that question as no proper foundation having been laid. This man is not qualified as an expert. It is leading and suggestive, calls for a conclusion.

Mr. O'Kelly: As far as the latter part of the

(Deposition of Jack P. Inman.)

question is concerned, I claim the right to cross-examine this witness as an adverse witness.

Q. You know how the line got into the thirteen, don't you, Mr. Inman; how the line you were sagging got into the 13,000? How the physical act of getting into the 13,000? You know what happened down there, don't you?

A. Well, it wasn't in the guard structure. It wasn't in the traveler and just dropped down into it.

Q. If it had been in the travelers it wouldn't have dropped into it, would it?

A. Not unless the guard structure would have broke or something. To my knowledge, I don't think it would.

Q. So that the real cause of this accident was the failure to put this in the guard structure, is that correct?

Mr. Coughlan: Object to the question; calls for a conclusion.

Mr. O'Kelly: I think he answered, "Yes." [14]

Q. Did you answer "Yes"?

A. I think that the accident wouldn't have happened; I don't think it would have happened at all if it had been in the guard structure.

Q. Was there any other action that is normally taken in connection with sagging of that sort that the contractor failed to do at this time?

A. All contractors have different methods possibly of sagging wire.

Q. Isn't it a practice when you are sagging wire, as you say, between 1 and 3 to have someone down

(Deposition of Jack P. Inman.)

on a reel taking it up down at position 1—rather, position 2 here—— A. No.

Q. ——in your exhibit? A. No.

Q. Do you remember Mr. Brown suggesting that that be done? A. No, I don't.

Q. Prior to the accident. You don't remember that? A. No.

Q. When is the line most apt to get into a line it is crossing? When you are pulling the line in or when you are sagging?

A. It is about a 50-50 chance each way.

Q. You never operated where they took special safety [15] precautions during the pulling-through process and then dropped them on the sagging such as killing a line or putting it in—— A. No.

Q. ——or out of a guard structure?

A. When you kill a line it is generally killed for sagging and stringing both.

Q. But at least you will concede that the stringing is as hazardous as the sagging, is that right?

A. A rough way to put that. You have tension both ways on stringing. In other words, you have your brakes on the reels and you have your pickups at the other end, where on sagging there is no way to pick that wire up as the slack is coming out.

Q. Didn't they have a reel down here at position 2 that they could have taken it up on?

A. Not connected up.

Q. It could have been done, just the same. When you say it is not connected up, they had a reel there to reel it up, didn't they?

(Deposition of Jack P. Inman.)

A. They could have put a winch truck down there and sucked this line on in.

Q. Have you worked for Lewis Construction Company since July 11th? A. No. [16]

Q. Do you know whether any of the other employees knew whether the line had ever been in the guard structure? Was there any discussion about it at all?

A. If it had been in the guard structure?

Q. Yes; if it had ever been in the guard structure? A. No.

Q. Now, did you hear any discussion as to why it wasn't in the guard structure? A. No.

Q. About where were you standing at the time of the accident?

A. About 5 to 6 foot in back of the truck.

Q. And what were you actually doing at that time?

A. I was pulling on the coffin hoist handle.

Q. You mentioned that before; what is a coffin hoist?

A. It is a chain ratchet affair to take slack out of line.

Q. A chain ratchet affair. Will you describe it a little better?

A. It has a long, heavy chain that goes through a ratchet—sprocket—and as you pull on the handle, it will suck that chain in. There is a hook on each end of this and you can hook grips on one end and hook the other end into a sling.

Q. What was this hooked to on each side? [17]

(Deposition of Jack P. Inman.)

A. Hooked to a dynamometer. We had a short choker over the penal hitch of the truck with the dynamometer on it. The coffin hoist on one end was hooked on the dynamometer and on the other end was hooked on a pair of grips and the grips was up on the face that we were sagging.

Q. "Face," you mean the line? A. Line.

Q. So that this is an arrangement for pulling up the line a little tighter with a dynamometer which is a measuring gauge—— A. Yes.

Q. ——to measure the tension on the line?

A. Yes.

Q. And you pull that up until the dynamometer reads proper tension and then who snubs the line at that point?

A. Hoot Brown was up the pole to snub the line on at that point.

Q. Where was Mr. Beedy at that time?

A. Standing across from me and approximately a foot closer to the truck.

Q. Was he working on this same thing that you were? A. Yes.

Q. You were injured in the same accident, were you? A. Yes. [18]

Q. You commenced an action against the Washington Water Power Company as a result of that accident, did you? A. Yes.

Q. Was this wire that you were working on grounded anywhere?

A. No; not to my knowledge.

(Deposition of Jack P. Inman.)

Q. Was it standard practice to ground wire when you were working on it in that way?

A. Yes.

Q. If it had been properly grounded, would that have avoided the accident?

Mr. Coughlan: Object to that as calling for a conclusion. No proper foundation been laid.

The Witness: Not being an expert or engineer, but I would say that it would have helped.

Q. (By Mr. O'Kelly): Were you using any kind of insulating equipment at all at the time?

A. No.

Mr. O'Kelly: That is all.

Redirect Examination

By Mr. Coughlan:

Q. Mr. Inman, do you know Mr. Sam Hammar?

A. Do I know Sam Hammar?

Q. Yes. [19] A. Yes.

Q. Do you know who he works for?

A. In that job he was an Inspector for Washington Water Power.

Q. And do you know Mr. Glenn George?

A. Yes.

Q. And who does he work for?

A. He is an Engineer for Washington Water Power.

Q. And were they on this job? A. Yes.

Q. Had they been inspecting the job between

(Deposition of Jack P. Inman.)

Wednesday and Sunday when this occurrence occurred?

A. Mr. Hammar had. I couldn't say about Mr. George, I don't know. He might have been at a different phase of the job at the time.

Mr. Coughlan: That is all.

Mr. O'Kelly: Mark this Exhibit "A" for Identification.

(The drawing referred to was marked Defendant Washington Water Power's Exhibit "A" for Identification.)

Recross-Examination

By Mr. O'Kelly:

Q. You said that Mr. Sam Hammar was there some time between Wednesday and Sunday. Do you know what days he was there?

A. To my knowledge, he was there every day on some phase [20] of the job.

Q. Was he there on the day of the accident—Sunday? A. I didn't see him.

Q. Did you see him on Saturday?

A. We didn't work on Saturday.

Q. When did you see him?

A. Saw him Friday.

Q. Saw him Friday. So that, actually, all you are saying is that you saw him there on Friday; you know he was there Friday?

A. I know he was there Friday.

Q. But that is all, isn't it?

(Deposition of Jack P. Inman.)

A. Well, it is quite hard to say whether a man was there or whether he wasn't.

Q. From your knowledge, all you know is what you saw, isn't it?

A. I can't remember back whether I saw him on Wednesday or Thursday or not.

Q. But you don't remember seeing him on Saturday or Sunday, do you? A. No.

Mr. O'Kelly: That is all.

Mr. Coughlan: That is all.

(Whereupon, at 10:40 a.m., the taking of the pretrial deposition of Jack P. Inman was concluded.) [21]

Changes Requested by Jack P. Inman Be Made in
His Foregoing Pretrial Deposition Transcript
for Inclusion on This Page:

Changes and Reasons Therefor:

Page 4, Line 2—Add Mountain States Power Company, Sandpoint, Idaho.

Page 11, Line 5—Add the words: "It was not."

Page 18, Lines 5 and 6—Substitute the word "phase" for "face" where it appears on these two lines.

Page 19, Line 7—Add the words: "It is standard practice."

I hereby acknowledge that I have been instructed to carefully read the transcript of my foregoing pretrial deposition taken on May 9, 1955, and to

(Deposition of Jack P. Inman.)

submit any changes, with the reasons therefor, for inclusion on this Change Page; that I have done so and the answers set forth, together with the changes on this page (if any), are the answers I gave.

/s/ JACK P. INMAN.

State of Washington,
County of Spokane—ss.

I, the undersigned, do hereby certify that I instructed Jack P. Inman to carefully read the foregoing transcript of his pretrial deposition and to submit any changes desired for inclusion on this page and thereupon to sign the same if it truly reflected his answers to the interrogation; that Jack P. Inman asserted he had read the foregoing transcript and acknowledged the answers contained therein are the answers he gave (together with the changes listed on this page [if any]), to the question propounded, and signed this certification to that effect.

[Seal] /s/ OREN J. CASEY,
Notary Public.

Dated May 11, 1955.

[Endorsed]: Filed May 12, 1955. [22]

[Title of District Court and Cause.]

DEPOSITION OF RUBEN LIDDELL BROWN

The following deposition of Ruben Liddell Brown, taken before G. C. Vaughan, a Notary Public for the State of Idaho, on May 16, 1955, at the Court Room of the United States District Court in the Post Office Building, Coeur d'Alene, Idaho.

Appearances:

THOMAS PAYNE, ESQ.,

Attorney for the Plaintiffs.

ALAN G. PAINE, ESQ.,

W. F. McNAUGHTON, ESQ.,

Attorneys for the Defendant.

Mr. Paine: This deposition is being taken due to the fact that this case has been unavoidably delayed, and is taken by agreement of counsel. The usual objections may be made at the time of trial to any of the questions, except as to the form of the questions. Is that agreeable?

Mr. Payne: Yes, that is agreeable.

RUBEN LIDDELL BROWN

called as a witness by the defendant, after being first duly sworn to tell the truth, the whole truth and nothing but the truth, testifies as follows:

Examination

By Mr. Paine:

Q. Will you state your name?

A. Ruben Liddell Brown.

(Deposition of Ruben Liddell Brown.)

Q. Where do you live, Mr. Brown?

A. I live in Salt Lake City, Utah.

Q. How old are you? A. Thirty.

Q. How long have you lived in Salt Lake City, Utah? A. For about ten months.

Q. Will you give us the street address there?

A. It is 2969 South 3435 East.

Q. Do you expect to be there during the Summer and Fall?

A. That's my brother's home. I stay with my brother and if I am not there he will know where I am at.

Q. What is your line of work or business? [2*]

A. Journeyman power lineman.

Q. Are you a member of the Union?

A. Yes, sir.

Q. And how long have you been a journeyman power lineman? A. About seven years.

Q. For whom are you working now?

A. A firm called Detweiler & Detweiler, out of Twin Falls, Idaho.

Q. What other companies or organizations have you worked for as a journeyman lineman?

A. I have worked for a lot of them. The Midland Constructors, Huntington Park, California. The Lewis Construction Company, Great Falls, Montana. Howard P. Foley Company and the Wasatch Electric Company, Salt Lake City——

Q. And several others? A. Yes.

Q. I think that is sufficient. Generally, and in

*Page numbering appearing at foot of page of original Reporter's Transcript of Record.

(Deposition of Ruben Liddell Brown.)

brief, what is the duty of a Journeyman lineman; tell us that?

A. I would say that it means, to me, to carry through in that classification; it is to be able to do anything they ask you to in the power line.

Q. That is in connection with either the maintenance or the construction of a power line?

A. Yes, sir.

Q. And you have been engaged in constructions jobs, have you? [3]

A. And maintenance work; I have worked for power companies, too.

Q. Were you employed at one time by the Lewis Construction Company? A. Yes.

Q. What particular piece of work were you engaged on there?

A. Reconductoring the highline; I think it started out up around Kellogg and ended up above Wallace.

Q. Who did the Highline belong to?

A. Belonged to the Washington Water Power Company.

Q. When you say reconductoring, what type of work is that?

A. It meant—well, I think they had copper wire in there and they wanted to increase the load on this line and so they were putting in aluminum, a larger wire to carry the load.

Q. To carry more electricity?

A. That's right.

Q. And those wires, in general, how did you do

(Deposition of Ruben Liddell Brown.)

that? Did you restring them or did you take the poles down or anything of that sort, or were the poles left standing?

A. The poles were left standing, but a lot of the cross-arms on the highline were changed and we pulled the aluminum in with the old copper, as they took it out they pulled this aluminum wire in with it.

Q. As I understand it, you attach the new wire onto a stretch of the old copper wire and then you would go [4] up the line a ways and then with your machine you would pull this wire out and the old copper wire would come and the new aluminum attached would come on and follow in place, is that right, through the insulators? A. Yes.

Q. So that the wire was kept up on the poles at all times? A. Yes, sir.

Q. Now, in that construction, did you have occasion to string those wires over several places where they crossed other wires underneath that had electric current in them? A. Yes, sir.

Q. That is known as a hot crossing, is it?

A. That's right.

Q. Do you remember about how many of those hot crossings you made on that stretch of work?

A. Well, no, sir; I don't, because I wasn't stringing—I wasn't on the stringing; I was on the sagging crew.

Q. But you do know there were several of them?

A. Yes, I do.

Q. And is that common practice? Have you often made crossings of energized lines?

(Deposition of Ruben Liddell Brown.)

A. Yes, sir.

Q. It is almost a necessity, isn't it?

A. Yes, it is; you can't very well get away from it.

Q. With the country so covered with lines as it is now? A. That's right. [5]

Q. Do you know of examples where others such as Bonneville Power Administration or Montana Power Company have done that?

Mr. Payne: We object to that unless he has worked for those companies.

Q. In your work as an experienced journeyman wireman, I think you did testify that it is common practice to make crossings of wires that are hot?

A. Yes, sir.

Q. What is done to prevent the wires from coming in contact? Is there several methods of doing that?

A. Well, yes, sir, there is; there are several ways; you can either set guard poles or guard structures or you can tightline your wire in by putting brakes on the reels with the new wire——

Q. ——so the wire is kept under tension at all times? A. Yes, coming in under tension.

Q. And it just pulls across and doesn't sag down? A. Yes.

Q. Or you say you build guard structures or poles that are set by the line that is energized and then have frames across so that if the wire that is above sags down it will hit the frame and keep out of the wire below? A. Yes, sir.

(Deposition of Ruben Liddell Brown.)

Q. And did the Lewis Construction Company use those structures in this work? [6]

A. They use guard poles but they didn't use them as a structure, they used them as a single pole and put a regular wire traveller on them.

Q. They had them on a single pole with a Shiv or Trolley arrangement hanging on the side of the pole where the wire would travel through?

A. Yes, sir.

Q. A good deal like this microphone hanging on here (indicating)?

A. That's right.

Q. And what would the effect of that be if the wire was put in those little travellers or pulleys? Would it keep it from contacting the hot wire?

A. Well, these travellers as you call them, that's what most everybody calls them, they have a gate on the side of them and this gate has an arrangement so you can open them and take the wire out, and it is put on there with a nut, a nut and bolt and screws down if it is put on there right.

Q. So that if you put the wire in the traveller and put this little nut and bolt on then it can't sag down and contact the other wire.

A. That's right, they can't get out unless you take them out, or the traveller breaks.

Q. Now, do you remember the time when Mr. Beedy was killed?

A. Yes.

Q. Up on this Lewis Construction job? [7]

A. Yes, sir.

Q. And Mr. Inman was injured?

A. That's right.

(Deposition of Ruben Liddell Brown.)

Q. And were you on the crew that day?

A. Yes, sir.

Q. Whereabouts was the accident?

A. Well, if I have my directions straight, I don't know too much about that, but I think it was about three miles Northeast of Wallace.

Q. About three miles northeast of Wallace?

A. Yes, sir.

Q. Tell us in your own words what you were doing that day in connection with it, beginning, maybe a little while before the accident?

A. I don't know just how to put it. I climbed the pole. They were going to sag this wire and I was going to climb the pole and Beedy and Inman and there was another fellow there by the name of Eliopoulos and another groundman there that I can remember the name. This Eliopoulos was driving a truck and I was going to climb the pole. Inman and this groundman and Beedy were going to work there on the ground—there has to be someone there to do the work on the ground, and before I went up on this pole—I had never been on this section of line there and I asked this man that we were working for, I said, "I can see some houses down [8] there." I said "Do you have a hot crossing down there?" and he said "Yah," and I said "What kind of a crossing is it?" and he said "A thirteen thousand crossing," and I said "Have you got a guard structure in there?" and he said "Yes," and I said "Is it a structure or pole?" and he said "It's a structure."

(Deposition of Ruben Liddell Brown.)

and I said "OK," and I asked him, I said "How does it seem to you?" I said, "You are going to run a lot of slack into that wire down there. Why don't you dead-end the slack side of this?" and he could have done it without any trouble. He said "We will waste a lot of wire." I said "You got this wire strung all the way through here and you got to waste it somewhere." I said "You got to waste so much to get it up to sag," and he said "No, we will just let it go ahead; it's in the guard structure down there and it won't bother anything." So I went up the pole and I put this winch-line that they had run off the back of the truck; that's what they were going to use to sag it with; pull it up as close to the sag as they could get it, and I hooked it on the wire and they pulled it out—the truck was setting there. You couldn't get it any further away from the structure and there wasn't enough room to get all of the slack out of it. So when they pulled it as far as they [9] could and the winch-line was all wound back in. I caught it off in a hoist and grip—we had a steel sling on the pole used to hold it, and I don't know why they did, and I never will know why, but they put on their grip and a steel sling from the back of the truck up on this wire and then released the winch-line. Well, the winch-line had to come back up the pole anyway and they couldn't reach up far enough with that wire still tight, from there, to do any good with it, so they sent it back up the pole again and started to pull again, and they just barely took enough slack so my

(Deposition of Ruben Liddell Brown.)

hoist came to where it released and when they did I released the hoist and stepped back around the pole to get out of the way of the wire and they started to pulling and I heard this awful moan and turned around and looked and Beedy was just peeling away from the truck and tipping over. He tipped over on his face away from the truck and Inman was still hanging onto it. He was the one that was moaning and shaking pretty bad: it was throwing him around. I hollered to this guy and said "You better start working on that man that's down and I beat it off the pole and by that time the circuit had evidently kicked out and dropped Inman loose and I started working on Inman and they started working on Beedy about the same time and Inman came out of it but Beedy was dead. [10]

Q. They were never able to resuscitate Beedy?

A. No.

Q. How far away from the crossing was this?

A. Well, I wouldn't know in exact feet, but I think it is pretty well impressed on my mind after watching a man die like that. I think that there was about four or five spans of wire from there down to this crossing.

Q. Four or five poles or spans? A. Yes.

Q. And had the wires been in the guard structures or pole with this messenger or carrier on down there would it have gotten in contact with the hot wire? A. No, sir.

Q. And there would have been no accident?

A. No, not to my way of thinking.

(Deposition of Ruben Liddell Brown.)

Q. What do you mean when you say you were sagging the wire; will you explain a little more what you mean by sagging the wire?

A. Well, when this wire is put up, especially this aluminum wire, it has to be pulled in at a certain tension because if it isn't it tends to wear itself out in these shoes they have to hold it up after they take it out of the travellers and there is a certain sag tension to it if you check into it——

Q. Sort of a standard amount of sag between the poles? [11]

A. That's right, and if you check into it with any of big aluminum producers you will see that they recommend an inch or within two or three inches and if you don't have it that way they won't even guarantee the wire, how long it will stay up.

Q. So after you get this aluminum to follow the copper through then you have to go along and get just the right amount of sag between each pole?

A. That's right.

Q. And you do that by wheeling it in on this winch?

A. Yes, until you get it in pretty close and then you can't move it.

Q. And you fasten it up to each pole as you go along?

A. You can't move it right onto the side with the winch because you just can't stop them in time so you put one of these cotton hoists on it and you pull it one notch at a time and in that way you can pull it right up to where it is supposed to be.

(Deposition of Ruben Liddell Brown.)

Q. You said that you suggested to the Foreman that he dead-end this wire; what did you mean by that?

A. I could probably show you a lot better if I could draw it out for you, but I can explain it if you want me to. (Witness makes sketch.) This is this line that came in that we were working on. It came up the hill like that. This is the dead-end pole here, the one that we were going to dead-end this wire on, and then [12] on over here there was an eight structure, and here was another dead-end and this started on the hill. All this wire came up like this and it went down through there and dropped way down into this canyon.

Q. Is this where the crossing was?

A. This is where the crossng is down in here. There was a single pole down there on that crossing but these bells, these dead-end bells, they stick out like this when the wire is pulled into them and there is a shoe that fits onto the end of them—a clamp shoe, and you put it in that, and that is what holds the wire up. These bells were hanging down on both sides of the pole that I was working on and I suggested when we first started, before we ever moved this wire, that we take this hoist and pull these bells out straight on this and fasten this wire here and cut it and have the winch-line holding it back this other way and cut it and then this wire couldn't ever move.

Q. If they had pulled it here then you wouldn't have had all this slack?

(Deposition of Ruben Liddell Brown.)

A. That's right. It wouldn't have run ahead on you or nothing; that was the suggestion that I made.

Q. Will you put an (a) here—that represents a dead-end does it? A. Yes.

Q. (a) is the dead-end pole. Now put a little—what do [13] you call these, the bells?

A. They are insulators.

Q. Now, just mark a little line out there with the letter (b)? A. Yes.

Q. Now, put a little arrow there with the letter (c). Now the letter (c) represents where you suggested that it be cut? A. Yes.

Q. That it be dead-ended? A. That's right.

Q. Had that been done, no wire could have slacked down the hill to the hot crossing?

A. Not unless it took this pole with it.

Q. The foreman said, "It would take too much time"?

A. That he didn't want to waste this wire. He said "If we cut it here and pull all that slack out, we would waste that wire." I said "Look; you've got it strung all the way through; you are going to waste it somewhere." I said "When you get to the end of the line you've got to take that slack out."

Mr. Paine: I would like this marked as Exhibit 1.

(Exhibit marked by Reporter.)

Q. Had you worked on the actual stringing of the aluminum across the thirteen thousand?

A. No, sir. [14]

(Deposition of Ruben Liddell Brown.)

Q. You had not been in the crew that had actually pulled it through? A. No, sir.

Q. Had the aluminum been put through that portion of it, do you know? A. You mean——

Q. Had the copper been taken out and the aluminum pulled through down as far as the crossing?

A. Yes, it was already through.

Q. This was just the sagging operation?

A. Yes, sir.

Q. How many crews did Lewis have working on that job? A. I think there was four.

Q. Do you remember what the foreman's name was? A. The one I was working for?

Q. Yes. A. Yes, it was Leo Pedalla.

Q. Do you know where he is now?

A. According to the information I have, Ed Rondig, I was talking to him, he was the superintendent, we were talking and he told me that this fellow was running a crew for him out of Belt, Montana.

Mr. Paine: I think that's all.

Cross-Examination

By Mr. Payne: [15]

Q. Mr. Brown, on the date of this accident you inferred that you were using a single-guard pole for the wire?

A. That is all that was in there. I never did see it until after the accident.

Q. Was it in the travellers after the accident?

(Deposition of Ruben Liddell Brown.)

A. No, sir.

Q. Did you inspect that?

A. Yes, sir; I went out there with the business agent from Local seventy-seven of Spokane after the accident.

Q. Would you say that it had ever been in the guard structure?

A. I can't tell you; I don't know whether it had or not. I do know that all three wires were floating free of the travellers on this guard pole. There is another way that a guy could have stopped all of that without anything more. All he would have to do is put a man down there with a telephone; they had the wire strung to use the telephone and if he had a man there watching that wire and then he could have seen them getting—getting down close there and he could have called them on the truck and told them to hold it.

Mr. Paine: He had telephone equipment?

A. He had it there, yes, sir; but he didn't use it.

Q. At the time that you and Inman and Beedy started this operation that ended in the death of Beedy, did you [16] request the foreman to make sure that these wires, or were you told by the foreman that these wires were in the travellers down below?—

A. Yes, he did.

Q. He told you they were?

A. Yes, he definitely told me they were because I asked him that I hadn't been over that section of line and I could see the houses down there and I

(Deposition of Ruben Liddell Brown.)

wanted to know how it was, what was down in there and he said "It is in the guard structure."

Q. Were there ever times in the past in making these hot crossings that request was made by the men for guard structures that was turned down?

A. Not that I know of; not on jobs that I ever worked on if they thought it was unsafe—you don't have to cross it until the journeymen linemen on the crew think it's safe, or consider it safe; that is the way I have always worked and that is the way all the people that I ever worked for have worked.

Q. In this particular job, that is on the job that Beedy was killed on, did you make hot crossings like this where they should not have been made?

A. Like I say, I never worked on the stringing crew.

Q. So you are not familiar with that?

A. Not on the stringing section. I worked strictly on the sagging crew. [17]

Q. Have requests been made, Mr. Brown, to your knowledge, that this wire will be killed?

A. Not that I know of.

Q. Not that you know of?

A. No, sir. Now, this is just a statement of my own, but actually it didn't need to be killed. If it had been put in there right in the first place there would be no need to kill it, because on some of those lines that are energized, you don't just take them out whenever you want to. The only time they are out of service is when they fall down.

Mr. Payne: I think that will be all.

(Deposition of Ruben Liddell Brown.)

Redirect Examination

By Mr. Paine.

Q. As a qualified journeyman lineman, with a proper guard structure over this crossing, would you consider it a perfectly safe operation to make the crossing?

A. Is that an opinion of mine you want?

Q. Yes.

A. No, I wouldn't consider it safe; not after I saw the guard structure.

Q. No, but I say with a proper guard structure there, would you consider it a safe operation?

A. Yes, sir, I would; it could have been made plenty safe. [18]

Q. Without de-energizing the line?

A. Yes, sir. That's right, but I don't think it was—That's just my opinion, and everybody that I have ever talked to about it didn't think it was either. They could have set one more pole in there and put one flat arm across there and there would have been no question about it. That wire could have gone half mile in the air and come back down and come flat down on the guard pole and arm and they wouldn't have had to have anyone there to watch it or anything; just put one more pole there with an arm across.

Mr. Payne: Were there any members of the Washington Water Power Company present at the time of this death?

(Deposition of Ruben Liddell Brown.)

A. No, not that I know of. There was a fellow came up there and cleared up the line after it happened. He was up the pole dragging this wire off. I went down to Wallace to get a pulmotor from the Fire Department and when I came back he was up the pole dragging this aluminum off.

Mr. Payne: That's all.

Mr. Paine: That's all; thank you, Mr. [19] Brown.

State of Idaho,
County of Ada—ss.

I, G. C. Vaughan, a Notary Public in and for the State of Idaho, do hereby certify that the witness named in the foregoing deposition appeared before me and was by me duly sworn to tell the truth, the whole truth and nothing but the truth in said matter.

I further certify that I am not a relative nor employee of any party connected with the within matter in any manner and am not financially interested in the said matter.

I further certify that the deposition was taken in the Court Room of the United States District Court at Coeur d'Alene, Idaho, on the 16th day of May, 1955, in shorthand and thereafter transcribed.

In Witness Whereof, I have hereunto subscribed

(Deposition of Ruben Liddell Brown.)

my name and affixed my seal this 24th day of May, 1955.

[Seal] /s/ G. C. VAUGHAN,
Notary Public for the State of
Idaho.

My Commission expires June 27, 1957.

[Endorsed]: Filed May 31, 1955.

[Title of District Court and Cause.]

DEPOSITION OF SAM HAMMAR

Appearances:

GLENN A. COUGHLAN,
THOMAS B. PAYNE,
Appearing on Behalf of the Plaintiffs.

ALAN G. PAINE,
ALAN P. O'KELLY,
Appearing on Behalf of the Defendant.

(Whereupon, at ten o'clock a.m., the above-entitled matter came on pursuant to written stipulation of counsel attached hereto to take the Deposition of Sam Hammar before Oren J. Casey, Certified Shorthand Reporter, and a Notary Public.)

SAM HAMMAR

called as an adverse witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Cross-Examination

By Mr. Coughlan:

Q. Will you state your name?

A. Sam Hammar.

Q. And where do you reside, Mr. Hammar?

A. In Spokane, 1718 West Kiernan Avenue.

Q. Spokane Washington? A. Yes.

Q. And what is your profession?

A. Electrical Engineer.

Q. By whom are you employed?

A. Washington Water Power Company.

Q. How long have you been so employed?

A. 22 years.

Q. Mr. Hammar, were you employed on the job near Wallace where there was a power line being reconstructed from Government Gulch to Silverton, I believe it was?

A. It was to Montana Sub—Yes, I was.

Q. And what was the nature of your job?

A. I was sent up there as the Inspector for that job by the company.

Q. Did you reside some place there while this job was [2*] being——

A. Yes, at Wallace most of the time.

Q. And could you just tell us briefly what you did there?

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Deposition of Sam Hammar.)

A. I inspected the work that was being done upon completion. I seen that materials were there for the contractor and advised Mr. George as to the progress of the job. Mr. George being my supervisor. Advised him of any troubles the contractor was in; that is, personnel and so on, which would delay the job in any way.

Q. Now, you spoke of Mr. George. What was his position?

A. Mr. George is Construction Engineer for the company.

Q. For the Washington Water Power?

A. Yes.

Q. And was he also there on the job?

A. Either once or twice a week he would come up.

Q. He would come up. Now, you were out there on the job daily, I presume? A. Yes.

Q. And the contractor was Lewis Construction Company? A. That is right.

Q. Now, this particular job started at Government Gulch, is that right? A. Yes, it did.

Q. And do you recall the date approximately when it did start? [3]

A. Started May 5th, 1954.

Q. Now, are you acquainted, Mr. Hammar, with the situation there near the Silver King Mine where that restringing operation was carried out?

A. Silver King? Silver Dollar, you mean?

Q. Well, it is fairly close to the start of the job?

A. Not the Silver King. I don't remember any.

(Deposition of Sam Hammar.)

Q. Is there a mine there called the Silver Dollar?
A. Yes, the Silver Dollar.

Q. Now, approximately the 20th of May do you recall the line being strung dropping into a 13,000 volt line there?

A. The Silver King? I don't remember any Silver King.

Mr. Payne: Off the record.

(Discussion had outside the record.)

Q. (By Mr. Coughlan): Go ahead, Mr. Hammar.

A. There was an accident there. That is, the wire broke—the sleeve—and it fell across a 13,000-volt line at the Bunker Hill tap.

Q. Well, now, this occasion that I speak of occurred prior to the one that happened at the Bunker Hill?

A. No, I don't remember of any accident.

Q. You are not aware of that?

A. No, I am not.

Q. Then going on to the Bunker Hill property, you are [4] aware of an accident where the line fell upon the 13,000 at Bunker Hill?
A. Yes, I am.

Q. And what happened at that time that you recall?

A. That was the instance where the sleeve broke or conductor broke and it slacked back, of course, striking the 13,000 volt line near the beginning of the pull.

(Deposition of Sam Hammar.)

Q. Of course that energized the line it dropped into, did it not? A. Yes.

Q. And what occurred as far as transformers were concerned, were there any transformers burned out or——

A. I understand the Bunker Hill people have a local distribution system there. I think it is called the Light House. And they informed Mr. Raunig through me—had told Mr. Raunig that they had trouble with the transformer and they wanted to see Mr. Raunig. And I told him to see them, giving the man's name. And he did that. And I understand it was trouble with the transformers of theirs.

Q. Were you aware at this same instance the line also fell on some houses at Wardner?

A. That was the same accident.

Q. The same one?

A. The tip of the wire as it pulled in two just struck one house going down. It didn't do any damage, however. [5]

Q. Was Mr. George present at this time?

A. No.

Q. Was he aware of this occurrence?

A. Yes, I informed him.

Q. Now, then, going on, Mr. Hammar, to the locality near the cemetery, somewhat east of the cemetery, at approximately the 15th of June, sometime in that neighborhood, were you aware of the line which was being strung falling into an energized line there? A. Yes.

(Deposition of Sam Hammar.)

Q. And there were some men burned at that place? A. No.

Q. Was it a subsequent time that somebody was burned there? A. No.

Q. Are you acquainted with a man by the name of Swenson?

A. No, I don't remember that name.

Q. Do you know a man by the name of Jack Inman? A. Yes.

Q. Did you at that time give Mr. Inman some ointment to put on one of these men who were burned?

A. Yes, I remember that now. He was on the telephone. And I think he, in hanging onto the receiver, blistered the tip of his fingers is all.

Q. Do you recall that there was a man there by the [6] name of Frank Reed? A. Yes, he was.

Q. Is it possible that he was the man who was burned on the fingers?

A. Well, it could have been.

Q. And Mr. Swenson was sitting on a truck and he was burned on the buttocks at that time, do you recall that? A. No, I don't recall that.

Q. You recall then that there was only one man burned, as near as you recall?

A. That is right, and he was just blistered on the fingers where he had hold of the receiver.

Q. Are you acquainted with a man by the name of Leo Padillo? A. Yes, I know him.

Q. Were you aware that he was burned in this same occurrence that we are speaking of?

(Deposition of Sam Hammar.)

A. No, I didn't know that.

Q. Was there a fire also as a result of this occurrence? A. That is right, there was.

Q. And the fire department was called?

A. Called, that is right.

Q. And was Mr. George present also at this occurrence? A. No.

Q. But he was advised, I presume? [7]

A. He was advised.

Q. And you were acquainted with the situation there, I presume, all the time during this period?

A. Yes. I might say here, that recalling this incident, the line underneath the conductor that was being strung in was dead but when that line pulled in two, the heavy line coming down on this already de-energized line stretched a jumper back at the adjacent pole or adjoining pole and it made it come in contact with a live conductor energizing the line underneath the one that was dead formerly and that is how the grass fire started. However, that line was de-energized during the operations.

Q. The power was cut off that line?

A. Yes.

Q. Prior to the time——

A. Prior to the stringing operations. But during the accident, why, it, like I say, pulled a jumper. The heavy weight pulled the jumper. The contact of the live wire on that pole energized the dead circuit.

Q. I see. Now, at a time subsequent to that, Mr. Hammar, at a place west of the Polaris Mine, were

(Deposition of Sam Hammar.)

you acquainted with the fact that the line again fell and got into some trees? That would be approximately the 21st of June.

A. West of the Polaris Mine?

Q. Yes. [8]

A. No, I don't recall that now.

Q. And on this same day or very near thereto, near the Silver Dollar Mine, were you acquainted with the occurrence where the line sagged down and broke a pole and the secondary line—the service to the mine was discontinued or torn out as a result of this falling down?

A. That was—Service to the Silver Dollar Mine was de-energized prior to the stringing operations. It was due to the fact that the service pole that was up on the hillside and the clearance between their service and the 110,000 line which was being strung in was minimum clearance and with any sagging at all it would have reached that service so we had the service cut dead to the mine. It probably sagged into that but it was dead at the time.

Q. You recall then something about the occurrence that I am speaking of? A. Yes.

Q. And that this line was torn down or something?

A. Yes, it was dead. It was de-energized.

Q. Then going along, Mr. Hammar, to a date approximately July 2nd of that same year, '54, at a point east of Osborne, Idaho, where the line goes across the highway, are you aware of the incident where the line fell to the ground there and it was on

(Deposition of Sam Hammar.)

the ground there for a period of time, perhaps a day? [9]

A. That was over a week end and the contractor had the conductor strung in up to sag and tension and for some unknown reason they were never able to get the culprit, but a construction firm who were doing work dredging along the line had a big boom truck—derrick truck—and over this week end—nobody saw it—this truck or boom truck apparently swung their boom into the line tearing it down on a Sunday.

Q. You say that there was no one who could state what had happened?

A. No one who could state who had done it definitely, but all indications—examining the conductor after it was down on the ground—indicated that the wire had been in contact with some metal object.

Q. And there was a considerable amount of wire on the ground, wasn't there?

A. That is right.

Q. As a matter of fact, it was actually in piles, wasn't it?

A. That is right, coiled up naturally due to the tension on the conductor. Two men came down to do the repairing temporarily to get it out of the highway.

Q. Now, all of these instances, I presume, were reported by you to Mr. George? A. Yes.

Q. He was advised? [10]

A. Yes. I say "culprit." This contractor who

(Deposition of Sam Hammar.)

was doing the work no doubt had insurance for such instances like that but he wouldn't be man enough to come out and report that he had done the damage to the line. It was just an act of negligence on somebody's part.

Q. Then, Mr. Hammar, there was another incident of the same day this man was burned that you speak of—the one that you know about——

Mr. O'Kelly: Which one was that?

Mr. Coughlan: Mr.——

Mr. O'Kelly: Someone burned his fingers on the telephone?

Mr. Coughlan: Mr. Reed, I thought, and Mr. Hammar thought maybe Swenson, is that correct?

A. No, I thought it was Reed. I don't know Swenson.

Q. Were you aware of an incident where the static wire running over energized wire fell into the energized wire? This would be in the same neighborhood of where the work was being done near the Kellogg Cemetery but may have not been in that exact area where the static wire was energized that day.

A. No, I don't recall any static wires falling into any energized line.

Q. Now, are you aware of an occurrence where the line being strung fell into a barnyard and on to a barn in the [11] Vicinity of the packing plant northwest of Wallace?

A. Are you speaking of the time when the fatal accident occurred?

(Deposition of Sam Hammar.)

Q. No; this was prior to that.

A. No, I don't.

Q. Are there any other instances besides those that we have mentioned here that you are aware of where there was trouble—the line fell into another energized line? A. No.

Mr. Coughlan: I believe that is all.

The Witness: Outside of the fatal accident?

Q. (By Mr. Coughlan): That is right. You are aware of the occurrence on the 11th of July where Mr. Beedy was killed? A. Yes.

Q. Were you present that day at this place where it occurred?

A. No, I was not.

Q. When was the last time that you were present there at the place where the Beedy accident occurred?

A. They were stringing—the place where the accident occurred was up on top of a mountain. I don't believe I had ever been there at that particular place prior to the accident.

Q. Were you ever at the place where the line crossed [12] the Nine Mile line? A. Yes.

Q. And when was the last time you were there prior to the accident?

A. Thursday prior to the accident.

Q. And wasn't line strung across there at that time? A. No.

Q. You were, of course, acquainted with those premises, however, prior to the stringing?

A. Yes.

(Deposition of Sam Hammar.)

Q. You knew what they were and how they looked and so on? A. Yes.

Mr. Coughlan: I believe that is all.

Mr. O'Kelly: I just wanted to ask you a clarifying question. You said that you were living up at Wallace. Did you stay there all the time?

The Witness: No, I went up Mondays and came back Friday afternoons arriving at Wallace around one or two o'clock Monday afternoon.

Mr. O'Kelly: And on the week end that the accident occurred which Mr. Beedy was killed in, you left there Friday and——

The Witness: Yes, with Mr. George's consent. We had outlined the work prior to the stringing operations. [13]

Mr. O'Kelly: I believe that is all.

Q. (By Mr. Coughlan): One further question. Mr. Hammar, was Mr. George there with you at any time in this area where the accident happened?

A. Oh, yes, we were all along the line together at one time or another. Just when I don't recall.

Q. I presume that would be numerous times, would it not? A. Yes, no doubt.

Mr. Coughlan: That is all.

(Whereupon, at 10:30 a.m., the taking of the deposition of Sam Hammar was concluded.) [14]

(Deposition of Sam Hammar.)

Changes in Form and Substance Requested by Sam Hammar Be Made in His Foregoing Deposition Transcript:

CHANGES IN FORM AND SUBSTANCE AND REASONS THEREFOR

At all places throughout this deposition where the spelling of "Hammer" is spelled with an "e" change the spelling to "Hammar" with an "a."

Page 4, line 17—Answer should read: "That is, the wire broke at a sleeve and the wire fell across a 13,000 volt line at the Bunker Hill Tap.

Page 6, line 24—Delete "is all."

Page 7, line 2—"Yes, he was employed by the contractor."

Page 8, line 6—Insert the word "de-energized" in place of "dead."

Pages 8, 9 to 11, incl.—This line should read: "* * * pole and the strain on the jumper caused it to contact the live conductor re-energizing the conductor underneath the Hi-line which the contractor was restringing. The grass fire started as a result of this mishap. However, * * *."

I hereby acknowledge that I have been instructed to carefully read the transcript of my foregoing deposition taken July 14, 1955, and to submit any changes in form and substance desired, with the reasons therefor, for inclusion on this Change Page; that I have done so and the answers set forth, to-

(Deposition of Sam Hammar.)

gether with the changes on this page, if any, are the answers I gave.

/s/ SAM HAMMAR.

State of Washington,
County of Spokane—ss.

I, the undersigned, do hereby certify that I instructed Sam Hammar to carefully read the foregoing transcript of his deposition and to submit any changes in form and substance desired for inclusion on this page and thereupon to sign the same if it truly reflected his answers to the interrogation; that Sam Hammar asserted he had read the foregoing transcript and acknowledged the answers contained therein are the answers he gave as supplemented by the changes and reason therefor listed on this page, if any, to the questions propounded and signed this certification to that effect.

/s/ BETH M. B. CASEY,
Notary Public.

Dated: July 22, 1955.

[Endorsed]: Filed September 21, 1955.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Idaho—ss.

I, Ed. M. Bryan, Clerk of the United States District Court for the District of Idaho, do hereby certify that the foregoing papers are that portion of the original files designated by the parties and as are necessary to the appeal under rule 75 (RCP), to wit:

1. Complaint.
2. Motion to Strike.
3. Motion for More Definite Statement.
4. Motion to Dismiss.
5. Minutes of the Court of January 17, 1955.
6. Interrogatories to Virgil Thompson.
7. Interrogatories to Washington Water Power Company and J. E. Royer, Vice President.
8. Answer to Interrogatories to Washington Water Power Company and J. E. Royer, Vice President.
9. Answer to Interrogatories to Virgil Thompson.
10. Minutes of the Court of February 15, 1955.
11. Order on Defendant's Motion to Dismiss.
12. Answer.
13. Minutes of the Court of May 16, 1955.
14. Motion for Summary Judgment with Affidavits Attached.
15. Minutes of the Court of July 7, 1955.

16. Cross-Motion for Summary Judgment With Affidavits Attached.

17. Motion to Strike Affidavits on Motion for Summary Judgment.

18. Minutes of the Court of August 5, 1955.

19. Memorandum Decision.

20. Summary Judgment.

21. Notice of Appeal.

22. Statement of Points on Which Appellants Intend to Rely on Appeal.

23. Affidavit of Mailing of Notice of Appeal, Designation of Contents of Record on Appeal and Statement of Points.

24. Designation of Contents of Record on Appeal.

25. Designation of Additional Portions of the Record on Appeal.

26. Deposition of Sam Hammar.

27. Deposition of Ed F. Raunig.

28. Deposition of Ruben Liddell Brown.

29. Deposition of Jack P. Inman.

30. Affidavit of Mailing of Designation of Additional Portions, etc.

In Witness Whereof I have hereunto set my hand and affixed the seal of said court, this 22nd day of September, 1955.

[Seal] /s/ ED. M. BRYAN,
Clerk.

[Endorsed]: No. 14893. United States Court of Appeals for the Ninth Circuit. Guenith Opal Beedy and Cynthia Guen Beedy, by His Next Friend, Guenith Opal Beedy, Appellants, vs. The Washington Water Power Co., a Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Idaho, Northern Division.

Filed: October 10, 1955.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the
Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 14893

GUENITH OPAL BEEDY and CYNTHIA
GUEN BEEDY, by His Next Friend,
GUENITH OPAL BEEDY,

Appellants,

vs.

THE WASHINGTON WATER POWER CO., a
Corporation,

Respondent.

ADOPTION OF STATEMENT OF APPEL-
LANTS' POINTS ON APPEAL AND DES-
IGNATION OF CONTENTS OF RECORD
ON APPEAL

Pursuant to provision of Rule 17 (6) of the Rules of the United States Court of Appeals for the Ninth Circuit, appellants hereby adopt the Statement of points on which appellants intend to rely on appeal and the designation of contents of record on appeal appearing in the typewritten transcript of the record in the above-entitled matter. Also print Notice of Appeal and Cost Bond.

Dated this 30th day of September, 1955.

/s/ THOMAS B. PAYNE,

/s/ GLENN A. COUGHLAN,

Attorneys for Appellants.

[Endorsed]: Filed October 11, 1955.

IN THE
United States
Court of Appeals
For the Ninth Circuit

GUENITH OPAL BEEDY AND CYNTHIA GUEN
BEEDY, BY HER NEXT FRIEND, GUENITH
OPAL BEEDY,

Appellants.

vs.

THE WASHINGTON WATER POWER CO., A
CORPORATION,

Appellee.

BRIEF OF APPELLANT

ON APPEAL FROM THE UNITED STATES DIS-
TRICT COURT FOR THE DISTRICT OF IDAHO,
NORTHERN DIVISION

THOMAS B. PAYNE
Residence: Wallace, Idaho.

GLENN A. COUGHLAN
327 Idaho Building
Boise, Idaho.

Attorneys for Appellants.

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IN THE
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GUENITH OPAL BEEDY AND CYNTHIA GUEN
BEEDY, BY HER NEXT FRIEND, GUENITH
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vs.

THE WASHINGTON WATER POWER CO., A
CORPORATION,

Appellee.

BRIEF OF APPELLANT

APPEAL FROM THE UNITED STATES DIS-
TRICT COURT FOR THE DISTRICT OF IDA-
HO, NORTHERN DIVISION

STATEMENT OF CASE

Guenith Opal Beedy and Cynthia Guen Beedy, hereinafter referred to as Appellants, surviving wife and child respectively of George D. Beedy, hereinafter referred to as Deceased, brought this action against the Appellee, The Washington Water Power

Company, hereinafter referred to as The Power Company, to recover damages for the death of their husband and father, alleging that he met his death as a result of the negligence of The Power Company, which was the direct proximate cause of his death (R 3-5). The Power Company then filed a Motion to Strike the last part of Paragraph VI of Appellants' complaint (R 6), filed a Motion for More Definite Statement as to Paragraph VI (R 7) and in addition, filed a Motion to Dismiss (R 8). The Motions were orally argued before the Court and the Motion to Strike and for More Definite Statement were denied (R 22) and the Motion to Dismiss was taken under advisement and later denied by order of the Court after submission of briefs and further oral argument (R 22-23).

The Power Company thereupon filed its answer admitting that it was a Washington Corporation authorized to do business in the State of Idaho and that the controversy exceeded the sum of \$3,000.00 exclusive of interest and costs; admitted it was engaged in the transportation, delivery and sale of electricity and that Deceased was an employee of the Lewis Construction Company of Great Falls, Montana, hereinafter referred to as the Contractor, who had contracted to change the wires, insulators and cross-arms on electrical transmission line for The Power Company; The Power Company denied any negligence on its part and denied that the Appellants suffered any damage.

The Power Company set up as affirmative defenses, that it was the employer of the Deceased; that Appel-

lants' suit was barred under the Workmen's Compensation Act of the State of Idaho; that Deceased was contributorily negligent; and that Deceased had assumed the risk (R 24-26).

After the issues were joined, the matter was set down for trial and due to a death occurring in one of the appellants' attorneys' families the day before the trial, the matter was continued over the term (R 27). Then on or about July 1, 1955, The Power Company filed a Motion for Summary Judgment supported by affidavits (R 27-81). The appellants filed Cross-Motions for Summary Judgment supported by affidavits (R 82-90) and after depositions were published the Motions were heard before Honorable William J. Healey, acting as District Judge in Boise, Idaho (R 91).

The Acting District Court by Memorandum Decision filed August 15, 1955, granted the Power Company's Motion and directed that judgment be entered accordingly (R 91). On August 26, 1955, Judgment for the Power Company was filed (R 92).

On September 8, 1955, Appellants filed Notice of Appeal (R 93) and Designation of Contents of Record on Appeal and thereafter within the required time filed cost bond.

JURISDICTION

Jurisdiction of the District Court is based upon diversity of citizenship, the Appellants being citizens of the State of Texas and The Power Company being a citizen of the State of Washington (R 3) and the

amount in controversy exceeding exclusive of interest and costs the sum of \$3,000.00 (R 3). Jurisdiction of the District Court arose under Title 28, Section 1332, United States Code.

This Court has jurisdiction to review the case on appeal by reason of Title 28, Sections 1291 and 1294, United States Code, and Rule 73 of the Federal Rules of Civil Procedure.

STATEMENT OF FACTS

This is an action for damages filed by appellants against The Power Company for the death of Deceased (R 3-5).

The Contractor and The Power Company entered into a written contract on the 27th of April, 1954, whereby the said Contractor agreed to replace conductors on the electrical transmission line owned by The Power Company between its substation at Government Gulch to its substation at Burke, Idaho (R 30-36, 99, 100). Pursuant to said contract the Contractor entered upon the work as provided for in the contract (R 100, 125, 161). On July 11, 1954, at a place on the above described transmission line approximately two miles northeast of Wallace, Idaho, the Deceased while in the course of his employment with the Contractor of sagging a new line just installed across a canyon over a 13,000 volt line owned by The Power Company, was electrocuted when the transmission line being sagged came into contact with the 13,000 volt line below it (R 126).

That between the 5th day of May, 1954, and the 11th day of July, 1954, when the fatal accident occurred, there were at least seven occasions when the transmission line being strung by the Contractor fell into trees, upon the ground, or into energized wires. Direct knowledge of four of these occurrences were admitted by The Power Company (R 162-169). On one of the occasions men were burned with the electrical energy of which fact The Power Company had notice and knowledge (R 164) and on the same occasion a fire was started as a result of the line being strung falling into energized wires (R 165). The Power Company had notice of the occurrences by virtue of the fact that they had an inspector upon the job daily, a Mr. Sam Hammer, (R 161), and an engineer, a Mr. Glen George, who was frequently inspecting the line with Mr. Hammer and was advised of the occurrences (R 167).

Two days prior to the 11th of July, 1954, Mr. Ed Raunig, Contractor's Superintendent, requested The Power Company to cut off the power on the 13,000 volt line running up Nine Mile Gulch over which they were to string the new line (R 104, 109). The Power Company refused to de-energize this line (R 80), as a result of which when the new line was being sagged over it, it fell into the energized line below, resulting in the electrocution of Deceased George D. Beedy (R 126-107).

SPECIFICATIONS OF ERROR

I

The Acting District Court erred in holding and in entering its Memorandum decision of August 15, 1955.

II

The Acting District Court erred in holding that The Power Company was entitled to a Summary Judgment as a matter of law.

III

The District Court erred in concluding that there is no controversial question of fact to be submitted for trial by the Court.

IV

The Acting District Court erred in entering Judgment for The Power Company.

V

The District Court erred in denying Appellants the right to trial by jury of the issues of fact set forth in their complaint.

VI

The District Court erred in considering issues of fact improperly raised by The Power Company in its Motion for Summary Judgment and self-serving affidavits attempting to state that it was in the business of repairing and constructing power lines.

VII

The evidence is wholly insufficient in any of the foregoing conclusions to support the judgment entered herein.

VIII

The Acting District Court erred in entering his Memorandum decision and Judgment thereby overruling the order of the District Judge dated April 6, 1955, which had become the law of the case.

IX

The District Court erred in holding that Power Company was the employer of the Deceased under the Idaho Workmen's Compensation Law so as to preclude a common law action by his wife and child.

X

The District Court erred in failing to find that The Power Company was negligent and as a direct result of said negligence the Deceased was killed.

XI

The District Court erred in not entering Summary Judgment for the Appellants.

STATEMENT OF ISSUES

1. Was The Power Company a third party under the Idaho Workmen's Compensation Law so as to allow a common law action for Deceased's wrongful death?

2. Did the Acting District Judge reverse the law of the case as established by the District Judge in his order of April 6, 1955?

3. Were there issues of fact presented which should have been submitted to a jury for determination?

4. Were the Appellants entitled to Summary Judgment in their favor?

5. Do the pleadings and evidence submitted support the Judgment of the Court?

ARGUMENT

I.

(Errors I, II, III, IV, V, VII)

Following the filing of Appellants' complaint in this action, The Power Company by its Motion to Dismiss (R 8) raised the issue, to-wit: Was Deceased an employee of The Power Company under the Idaho Workmen's Compensation Law so as to preclude a common law action for damages? Or stated another way, was The Power Company a third party who could be sued for negligently causing the death of the Deceased?

The Power Company contended that it was the employer of the Deceased under Idaho Code, Section 72-1010, and therefore Workmen's Compensation benefits was the exclusive remedy of Appellants. Appellants' position is that The Power Company was a third party against whom an action could be brought

pursuant to Idaho Code, Section 72-204. The matter was fully briefed and argued to the District Court who held by its Order of April 6, 1955, that the tests as to whether or not The Power Company was the Deceased's employer could only be determined on presentation of the case on its merits (R 22-23). The Power Company then by Motion for Summary Judgment raised the identical issue heretofore decided by the District Court. The Motion was heard by the Acting District Judge who by memorandum decision, without stating any reasons therefore, granted The Power Company's Motion. This action of the Acting District Court was error since it reversed the decision of the District Judge who had already decided this matter by order which became the law of the case and was not subject to change by the Acting District Judge.

The rule is fundamental that when one judge makes an order in a case it thereupon becomes the law of the case and should not be disturbed by another judge of the same court sitting in the same case. This universal rule is discussed in *Commercial Union of America, Inc., v. Anglo-South American Bank, Ltd.*, 10 F. (2d.) 937 CCA (2), a case directly in point where it was held,

“Where District Judge denied Motion to dismiss complaint, his decision was the law of the case as established in District Court, and should have been so treated by any other judge sitting in same case in that court; hence latter order of different judge dismissing complaint was improper.

Judges of co-ordinate jurisdiction sitting in the same court and in the same case, should not overrule the decisions of each other."

To the same effect are:

Sutherland Paper Company v. Grant Paper Box Co., et al 9 FRD 422;

North American Phillips Company, Inc., v. Brownshield, 111 F. Supp 762;

United States v. The San Leonardo 71 F. Supp 852;

Engler v. General Electric Company 32 F. Supp. 913.

The District Judge in his order of April 6, 1955 (R 22-23) set forth the genuine questions of fact which would have to be determined on trial as follows:

(1) Did the essential element of the relationship of employer and employee exist. to-wit, the right of control? and,

(2) Did the work being done pertain to the business, trade or occupation of The Power Company carried on by it for pecuniary gain?

These are issues which would have to be submitted and determined upon the merits. A Summary Judgment cannot be granted where there are questions of fact for submission to the jury.

Merely because both parties moved for Summary Judgment did not change the rule that when there are questions of fact they must be submitted to the jury.

This rule is set forth in the case of *Alabama Great Southern Railroad Company v. Louisville and Nashville R.R. Co.*, 127 F. Supp 363, where the Court said,

“Genuine issues of material fact are not to be resolved on Motion for summary judgment, merely because both parties have moved for summary judgment.”

The rule is universal that where there is an issue of fact to be tried, a motion for summary judgment cannot be granted.

Federal Practice and Procedure—(Barron & Holtzoff) Vol. 3, Page 70;

Dewey v. Clark
180 F (2) 766;

Bridgeport Brass Co. v. Bostwick Lab., Inc.,
et al 181 F. (2) 315;

Fredrick Hart and Co., v. Recordgraph Corporation
169 F. (2) 580;

Boerner v. United States
26 F. Supp. 769.

Summary judgment must be denied if the evidence is such that conflicting inferences could be drawn therefrom or if reasonable men might reach different conclusions.

Federal Practice and Procedure, (Barron & Holtzoff) Vol 3, Page 78.

Winter Park Telephone Co. v. Southern Bell Tel. & Tel. Co. 181 F (2) 341 (CCa 5th) ;

National Surety Corp. v. Allen-Codell Co., et al 5 F.R.D. 3;

Ramsouer v. Midland Valley Railroad Co. 135 F. (2) 101.

The Power Company will undoubtedly argue that they changed the situation by filing affidavits. We respectfully submit that the affidavits submitted by The Power Company are patently self serving. They contain opinions, conclusions, hearsay, and self-serving statements which are denied by the Appellants and are matters of proof for submission to a jury. As has been said, "We do not substitute trial by affidavit for trial by jury." That would be the result if the present holding in this case were allowed to stand. There was absolutely nothing new or different raised by The Power Company during the two times this matter was argued before the District Judge and the last time it was presented to the Acting District Judge.

The matter has been passed on directly by a Federal Court in the case of Tansey v. Transcontinental and Western Air, Inc., 97 F. Supp. 458, where it was held in an action for personal injuries sustained in airplane accident, Defendant's motion for summary judgment based on provisions of Missouri Workmen's Compensation Law would be overruled where there

was doubt whether Plaintiff was covered by the provisions of such law.

Not only is there doubt as to whether the provisions of the Idaho Compensation Law deny relief in the case at bar, but in addition, we have the order of the District Judge stating that facts would have to be submitted at trial on these issues, together with the Idaho decisions holding that owners in situations as in the case at bar are not employers under the Workmen's Compensation Law.

II

(ERRORS VIII AND IX)

Third Party actions are maintainable in Idaho as established by *Lebak v. Nelson*, 62 Idaho 96, 107 P (2) 1054, holding,

“The acceptance of Workmen's Compensation for death of employee does not preclude maintenance of action for damages against third party whose negligence allegedly caused injury or death.”

Followed by *Lake v. State*, 71 Idaho 107, 227 P. (2) 361:

“The liability of the employer and surety for compensation is a separate and distinct liability from that of the third party tort-feasor for damages.”

and *Hancock v. Halliday*, 67 Idaho 119, 171 P. (2) 333.

The Power Company contends that it was the employer of deceased by virtue of Idaho Code, Section 72-1010:

“ ‘Employer’ unless otherwise stated, includes anybody of persons, corporate or unincorporated, public or private, and the legal representative of the deceased’s employer. Includes the owner, or leasee of the premises. or other persons *who is virtually the proprietor or the operator of the business there carried on*, but who, by reason of there being an independent contractor, or for any other reason, is not the direct employer of the workman there employed. If the employer is secured, it includes his surety so far as equitable.”

We have italicized a portion of the statute for emphasis in order to point up the fact that The Power Company was not the employer of the deceased since it was not the proprietor or operator of the business there carried on. This position is borne out by the case of *Moon v. Ervin*, 64 Idaho 464, 133 P. (2) 933 where an owner had contracted with a contractor to build a house. An employee of the contractor was injured on the job. The owner was sued for compensation benefits by the injured employee of the contractor upon the theory the owner was liable under Idaho Code, Section 72-1010, as an employer. The court held that although he was the owner of the premises, he was not the employer of the injured claimant for two reasons. First the essential element of the

relationship of employer and employee, to-wit: the right of control, was not present, and second, that the owner was not the proprietor or operator of the business there being carried on, i.e., the construction of a building. In support of this holding the court cited *Palmer v. J. A. Terteling & Sons*, 52 Idaho 170, 16 P. (2) 221; *Jones v. Packer John Mines Corp. et al*, 60 Idaho 653, 95 P. (2) 572; *In Re Fisk*, 40 Idaho 304, 232 P. 569.

The case at bar comes within the *Moon v. Ervin* rule, *supra*, because the Contractor, the employer of the Deceased, was an independent contractor, as shown conclusively by the written contract (R 30-36). Accordingly, then, as in the *Moon v. Ervin* case, the element of control is not present. The Power Company had no right of control over George Beedy, the employee of the Contractor, and, secondly, as in the *Moon v. Ervin* case, The Power Company was the owner of the premises but was not the proprietor or operator of the business there being carried on, i.e., the rewiring of the power lines. The proprietor and operator of this business was the independent contractor, Contractor, a company specifically engaging in this type of work competitively, as distinguished from The Power Company whose business was that of manufacturing and selling electrical power. Therefore, we urge that the issue has been decided heretofore in accordance with the contention of the Appellants that The Power Company is not an employer under the Workmen's Compensation Law and the Appellants are entitled to have their claim presented to a jury.

The Power Company's contention that it was Deceased's employer is refuted by the Idaho Supreme Court in *Gifford v. Nottingham*, 68 Idaho 330, 193 P. (2) 831, where the City of Pocatello had contracted for sewer construction with a general contractor, Nottingham, and Gifford, an employee of a subcontractor of Nottingham was killed. Gifford's heirs instituted suit for damages. The plaintiff's contended in this case that the City (which has the same position as The Power Company here) was the employer. In answer to this the Court said:

"While respondents argue that the City of Pocatello was the actual proprietor and therefore the employer as defined in Section 43-1806, I.C.A., (now Sec. 72-1010, Idaho Code), and that by reason thereof Nottingham is not included within the statutory definition of an employer, such a contention is directly in conflict with *Moon v. Ervin*, 64 Idaho 464, 133 P. (2) 933, wherein this court held that the owner of residence property, who let a contract to a contractor for the construction of a residence thereon, was not the employer of the workmen of the Contractor, within the meaning of the statute, and that further such owner was not the proprietor or operator of the business there being carried on, to-wit, the construction of the dwelling."

Appellants respectfully submit that the above language of the court destroys completely The Power Company's argument that it was the employer under the facts existing in this case.

The next case bearing on the question coming down from the Idaho court is *Laub v. Meyer, Inc.*, 70 Idaho 224, 214 P. (2) 884, which cites both the *Moon v. Ervin* and the *Gifford v. Nottingham* cases, *supra*. The general rule for determining whether the status of employee exists is set forth on page 227 of the Idaho opinion as follows:

“The general test is the *right* to control and direct the activities of the employee, or the power to control the details of the work to be performed and to determine how it shall be done, and whether it shall stop or continue, that gives rise to the relationship of employer and employee, and where the employee comes under the direction and control of the person to whom his services have been furnished, the latter becomes his temporary employer, and liable for compensation.”

The preceding rule follows the first proposition of *Moon v. Ervin*, that the right to control must be present to establish the employer-employee relation.

It is definitely established by The Power Company's Manager, Virgil Thompson, in answer to Appellant's Interrogatory No. 7 that the Contractor was an independent contractor and that The Power Company exercised no control over Contractor's personnel, as follows:

“The work was being done by an independent contractor who was completely responsible for methods of operation. The Company made no

safety inspections in connection with the work. Under our contract with the Lewis Construction Company we had no control over their method of operation and no supervision over the contractor's personnel." (R 17).

The Moon v. Ervin case, *supra*, is then followed by McGee v. Koontz, 70 Idaho 507, 223 P. (2) 686, holding that a mill owner who sold mill on conditional sales contract was not employer of the purchaser's employees, stating:

"In order to hold one as an employer under the Workmen's Compensation Act, the owner of the premises, who is not the direct employer of the workmen employed on such premises, must be shown to be the proprietor or operator of a business carried on on such premises."

This ruling points up the distinction which the Acting District Judge did not recognize. The owner to be an employer must be shown to be *the proprietor or operator of the business carried on on such premises*.

For emphasis we reiterate. The Power Company *was not the proprietor or operator of the electrical reconductoring business being carried on on such premises*. The Contractor was such proprietor and operator and this is established by the contract between The Power Company and Contractor (R 30-36), and the admission of The Power Company that there was no control or supervision by it and that it

had nothing to do with the business there being carried on (R 17).

All through the decision runs the premise that the law shall be interpreted liberally as to injured workmen. It is even contained in the statutory law, Idaho Code, Section 73-102, providing:

“The rule of the common law that statutes in derogation thereof are to be strictly construed, has no application to these compiled laws. The compiled laws establish the law of this state respecting the subjects to which they relate, and their provisions and all proceedings under them are to be liberally construed, with a view to effect their objects and to promote justice.”

The injured man is entitled to both remedies of compensation and common law recovery in cases of third party tort-feasors.

Idaho Code, Section 72-204;

Department of Finance v. U.P. R.R. Co., 61 Idaho 484, 104 P. (2) 1110;

Lebak v. Nelson, 62 Idaho 96, 107 P. (2) 1054;

Lake v. State, 71 Idaho 107, 227 P. (2) 361.

The Idaho court in *Hancock v. Halliday*, *Supra*, page 129, holding contract physicians liable for negligent injuring of a worker as third persons had this to say:

“Contract physicians are third persons as contemplated by Section 43-1004, I.C.A. (now Idaho

Code, Section 72-204) ; to hold otherwise would be contrary to the plain wording of that section, and to this Court's fixed policy of liberal construction of the act in favor of the employee (Moon v. Ervin, et al, 64 Idaho 464, 133 P. (2d) 933; Stover v. Washington County, 63 Idaho 145, 118 P. (2d) 63) Olson v. U.P.R.R. Co. 62 Idaho 423, 112 P. (2d) 1005) and deprive appellant of property without due process of law, in violation of Art. 1, Sec. 13 of our Idaho Constitution."

To deny Guenith Beedy and the minor child, Cynthia Beedy, right to recover from The Power Company for its negligent killing of their husband and father would be in derogation of the liberal construction of the law in favor of injured workers and a deprivation of appellants' property as the court stated above. Surely it is recognized that death benefits under the compensation law are grossly inadequate to compensate for the Appellants loss. Lebak v. Nelson, *Supra*, page 113.

The decisions in Idaho adequately sustain Appellants' position and it is not necessary to go outside the state for authority. However, we find a recent California case which is directly in point that should be cited. McDonald v. Shell Oil Co., 275 P. (2d) 922, holds:

"That employee of independent contractor had obtained a Workmen's Compensation award for injuries sustained on job did not preclude employee from seeking damages from contractor's

principal for negligence in maintaining defective equipment.”

A recent Federal case which goes into the question very thoroughly discussing and analyzing the authorities is *Sears Roebuck & Co., v. Wallace*, 172 F. (2d) 802, from the Circuit Court of the Fourth Circuit. Sears Roebuck hired an independent contractor to make alterations on its warehouse building. The foreman of a gang of workmen of a subcontractor was injured and was held entitled to recover damages against Sears Roebuck. The decision states:

“It was, therefore, held that the making of extensive alterations on the storage warehouse was not a part of the “trade, business or occupation” of a seller of merchandise leasing the warehouse for storage purposes within the Virginia Workmen’s Compensation Act, so as to create compensation liability to an employee of the subcontractor sustaining injuries while making alterations and preclude a common law action by him against the seller for injuries.

The defendant insists that the work upon which the plaintiff was engaged in this case was barred by the defendant’s business by reason of the fact that the work was done in the building in which defendant was conducting its business and was necessary to the conduct thereof. We do not think that this reasoning can be sustained. The defendant was in the business of selling merchandise and needed the storage warehouse

to facilitate that activity; but it was not in the construction business, and when extensive alterations of the warehouse were deemed desirable, the defendant did not undertake to perform the work itself but employed a construction company to execute it. It was, therefore, free from the obligation to furnish compensation to the contractor's employees and remained liable for its torts."

The Court in its opinion cited the following opinions from other jurisdictions:

"The controlling principle, however, is well stated and illustrated in *King v. Palmer*, 129 (Conn.) 636, Pages 640-641; 30 A. (2d) 549, Page 552, where the Court held that a statute like Virginia's did not require the trustees of a railroad company to pay compensation to an employee of an independent contractor who had undertaken to replace the entire heating and service system of the railroad's engine house. The Court said:

We have regarded, however, the broad policy of the Workmen's Compensation Act; *Bello v. Notkins* 101 (Conn.) 34, 37, 124 A. 831; *Massolini v. Driscoll*, 114 (Conn.) 546-553, 159 A. 480; and in effect, have held that the words, 'process in the trade or business' include all those operations which enter directly into the successful performance of the commercial function of the principal employer.

On the other hand, where the work in which the employees is engaged does not directly enter into the performance of the commercial function of the claimed principal employer, but only affords facilities for the conduct of his trade or business, we have held that the work is not a 'process' in that trade or business. This is so as regards the construction of a factory building; *Bogoratt v. Pratt & Whitney Aircraft Co.*, 114 (Conn.) 126, 136, 157 A. 860; and the construction of a partition in a factory; *Brown v. Waterbury Battery Co.*, 129 (Conn.) 44, 50, 26 A. (2d) 467; 150 ALR 1210."

It is clear, therefore, that The Power Company in this case cannot hide behind the Workmen's Compensation Act of the State of Idaho and avoid liability for its negligent killing of the employee of the Contractor. The construction and rewiring of power lines is not the business of The Power Company. The business of the Power Company is generating and selling electrical energy to its customers. It is not argued by The Power Company that it engages in the business of constructing power lines or rebuilding power lines for others for hire. The distinction is recognized. The *Sears Roebuck Co. v. Wallace* decision, *supra*, holding that the work to be employment of the owner must be in the *commercial function of the principal employer*, states the general rule.

The rebuilding of a power line is not the commercial business of The Power Company. It is a separate function affording only facilities for carrying on its usual business, which it contracted out independently to a company which was engaged in exactly that type of business in which The Power Company does not engage or compete in anywise commercially.

We wish to summarize briefly cases involving electric utilities directly which sustain our position.

Where Rural Cooperative was organized to manufacture, purchase, and distribute electricity and construct buildings, transmission lines, etc., it engaged contractors to construct its primary transmission lines and most of its service connection, construction thereof was not part of cooperative's "usual trade, occupation, profession or business" within unemployment Compensation Act and hence contractor's employees could not be deemed Cooperative's employees for unemployment tax purposes. *Gliddon Rural Electric Cooperative v. Iowa Employment Security*, 20 NW (2d) 435 (Iowa) ;

A power corporation contracted with one company to do the plumbing on an extension project at its plant, and another company for general construction work. Under the evidence, the corporation was held not the "common employer," hence could be sued as a third party tortfeasor by an employee of the plumbing company doing the work. *Jones v. Florida Power Co.*, 72 So. (2d) 285.

A public highway along which poles were being erected by independent contractor for power company did not constitute "premises under company's control" within provision of Compensation Act, making Act applicable to contractor's employees while performing work on premises under principal's employers control. *Bates v. Connecticut Power Co.*, 33 A. (2d) 342 (Conn.).

An electric company which was subject to Workmen's Compensation Act and was engaged in work on building was not engaged in the "same or related" business with Plate Glass Company which was also subject to Workmen's Compensation Act, so as to confine electric company employee who sustained injuries while assisting Plate Glass Company employees in unloading plate glass, to damages recoverable under the Workmen's Compensation Act and deny him right to damages assessed by jury in the law action for personal injury. *Pittsburg Plate Glass Co. v. Carey*, 98 F. (2d) 533.

Iowa-Illinois Gas Electric Company v. Industrial Commission et al, 95 NE (2d) 482, has this to say on page 489:

"From the foregoing authorities and many others cited in note in 150 ALR 1214, the general trend, while not laid down with exactitude, seems to hold that where the work in which the employee is engaged does not enter into the

commercial functions of the principal employer, but only affords facilities or casual convenience for the conduct of trade or business, it cannot be held to be a part of the business.”

III (ERRORS X, XI)

The record shows: (1) That The Power Company through its agents and employees had notice of several occurrences when lines being strung fell down into energized lines and on one occasion when men were burned (R 162-169).

(2) That in spite of this knowledge, the Power Company refused the request to cut off the power so the crossing could be made in safety (R 80, 104, 109).

(3) That as a direct proximate cause of The Power Company's arbitrary refusal, deceased, George D. Beedy, was electrocuted (R 126-127).

We submit the record shows a negligent disregard for safety on the part of The Power Company who owned and controlled a dangerous agency which resulted in death of a workman. The Cross Motion for Summary Judgment of Appellants should have been granted and the matter submitted to a jury only for fixing of damages and the Acting District Court erred in failing so to do.

CONCLUSION

It is well recognized that the compensation law benefits do not in any measure adequately compensate

for the death of appellants' husband and father. The Power Company's position that because the Contractor carried compensation insurance that it should be excused for its negligent acts should not be sustained.

We submit to permit The Power Company to escape liability for its negligence on the strained construction of the statute for which it contends would be neither reasonable nor justice.

The holding of the Acting District Judge should be reversed.

Respectfully submitted,

THOMAS PAYNE

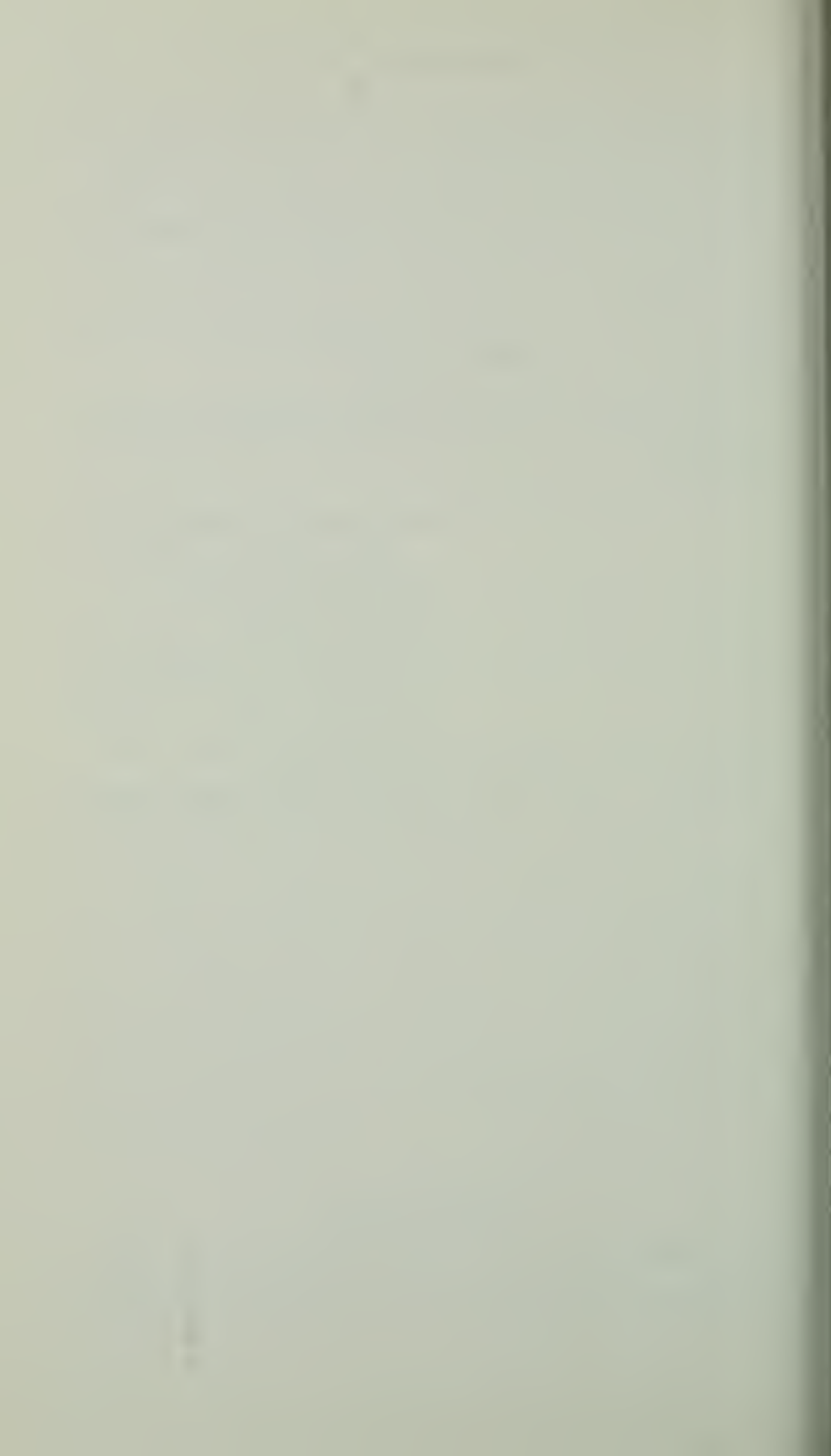
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IN THE
United States
Court of Appeals
FOR THE NINTH CIRCUIT

GUENITH OPAL BEEDY and CYN-
THIA GUEN BEEDY, by his next
friend, GUENITH OPAL BEEDY,
Appellant,

vs.

THE WASHINGTON WATER
POWER CO., a Corporation,
Appellee.

No. 14893

Appellee's Answer Brief

*Upon Appeal from the District Court of
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APPELLEE'S ANSWER BRIEF
JURISDICTION

This action was brought by Guenith Opal Beedy and Cynthia Gwen Beedy by her next friend, Guenith Opal Beedy, citizens and residents of the State of Texas, against the appellee, the Washington Water Power Company, a Washington corporation, having its principal place of business in Spokane County, Washington (TR. 3). The action was brought in the United States District Court for the District of Idaho, Northern Division, and was an action to recover damages for the death of George Beedy, husband of Guenith Opal Beedy and father of Cynthia Gwen Beedy, alleged to have been caused by the negligence of appellee, the Washington Water Power Company. The amount of the recovery sought was the sum of \$200,000.00 (TR. 5), no part of which claim was admitted, but all liability was denied by appellee (TR. 24-26).

Jurisdiction of the District Court existed under Title 28, Sec. 1332, USC.

Appellants have appealed from the final judgment dated August 24, 1955, denying relief to plaintiff. Notice of Appeal was filed on September 8, 1955, and a copy of said notice was mailed to the attorneys for the defendant the same date (TR. 93, 96).

Jurisdiction of the United States Court of Appeals for the Ninth Circuit to review the case is believed to exist under Title 28, Sec. 1291 and 1294, USC, and Rule 73 of the Federal Rules of Civil Procedure.

COUNTER-STATEMENT OF THE CASE

On or about April 27, 1954, the Washington Water Power Company, hereinafter referred to as the Power Company, entered into a contract with the Lewis Construction Company, under the terms of which the Lewis Construction Company, hereinafter referred to as "Contractor," agreed to furnish all the equipment and perform all the work consisting of replacing conductors on an electric transmission line of the Power Company from the Company's substation at Government Gulch to the substation Burke in the State of Idaho, a distance of about 22.33 miles. This work included replacing present crossarms in poor condition, removing overhead ground wires on certain portions of the line, replacing a certain type of insulators with another type of insulators, replacing the copper conductor with aluminum conductor, and replacing guys or anchors or both, which had deteriorated. The Power Company, referred to in the contract as "Owner," supplied all line materials which were stockpiled at Wallace, Idaho (TR. 30, 31).

The transmission line being reconducted, was a heavy 110,000 volt main transmission line which passed over the top of a number of low-voltage electric distribution lines. It was agreed and understood by the Contractor that he would be responsible for restringing the conductor over these low-voltage distribution lines without turning off the electric current in the distribution lines. In the trade, this is referred to as "a hot crossing." The bid of the Contractor was based on

making all hot crossings (Tr. 111, 112). Making a hot crossing is a common operation, but making a hot crossing requires erection of a guard structure by the Contractor and this necessarily involved more time and work (TR. 67, 132, 145, 146, 156).

From the beginning of the work, it was definitely understood by the Contractor that the crossing where the accident occurred would have to be made hot because the Power Company felt it could not deprive its many customers, including a number of industries, who were dependent upon this particular distribution line, of power for the period of time necessary to make the crossing (TR. 111, 112).

On Thursday preceding the accident, a line crew working for the Contractor pulled out the old copper conductor which passed over this distribution line and replaced it with new aluminum wire. On the following Sunday, a crew, including decedent, was pulling the new wire up to proper tension. In so doing, they allowed some slack wire to run down a mountainside and the new conductor dropped into the distribution line, sending electricity through the new line and causing the death of George Beedy. A guard structure was erected at this particular crossing, but at the time of the accident it was not being used. Had the guard structure or any other suitable guard structure been used at the crossing, the accident would not have happened (TR. 120, 134, 150). The Power Company did, as the work progressed, in order to speed up construction and assist the Contractor, de-energize or kill as many of the distri-

bution lines as it could without seriously inconveniencing its customers (TR. 112, 113). The 13,000-volt distribution or feeder line involved in the accident supplied approximately 190 residential and commercial customers—4 mines, a mill, a meat-packing plant, and a lumber company; and there was no alternative source of electric power to supply these customers (TR. 79). Making the crossing required approximately seven hours' work on Thursday preceding the accident and about five hours' work on the Sunday of the accident (TR. 117, 118, 128).

It is conceded that the work being done was being done on the premises of appellee (TR. 85). Appellee, The Power Company, maintains crews on its own payroll for the construction and reconductoring of transmission lines and contracts out any excess work that it cannot handle with its own crews (TR. 65-69). The Idaho Power Company, a major utility in the State of Idaho, maintains the same practice; and in fact during the past three years has done all of its own construction work through its own crews (TR. 69-71). The same is true of the Utah Power and Light Company (TR. 71-74) and the Pacific Power and Light Company (TR. 75-78). In the public utility industry generally the construction and reconductoring of transmission lines is considered part of the business of the utility (TR. 67, 74).

SUMMARY OF ARGUMENT

The appellee's argument in this case may be divided into three main sections. Section I will show that there

was no disputed relevant fact and that it was proper for the Court to enter a summary judgment. Section II will show that viewing the contentions of the Appellants in the light most liberal and favorable to the Appellants would not as a matter of law justify submitting this case to a jury on the issue of negligence. Section III will show that the District Court properly granted summary judgment on the ground that under the Idaho Workmen's Compensation law, defendants stood in relation of employer to the decedent.

ARGUMENT

I

The argument of appellee that the acting District Judge overruled the District Judge's order of April 6, 1955 (TR 22, 23) need be noted but briefly. The District Judge's order of April 6, 1955, was predicated entirely upon the sufficiency of the Complaint to state a cause of action. Appellee made no attempt to move for summary judgment at that time, since the matter could be set for trial and disposed of at an early date. At the time set for trial, the matter was stricken from the trial docket at the last minute on Appellant's motion after appellee had prepared for trial and had its witnesses available. Appellee then took the deposition of one of its witnesses who was present at the place of trial (TR. 142) and proceeded to secure additional affidavits and put the record in proper condition for a summary judgment motion in order to dispose of the matter promptly and without a long delay.

The acting District Judge, in passing on the Motion

for Summary judgment had a record completely different from the record before the District Judge in passing upon the sufficiency of the complaint. At the time of the argument before the District Judge on the Defendant's motion to dismiss, plaintiff's counsel argued very strenuously that this case, so far as the Workmen's Compensation Act is concerned, is governed by certain cases, including the case of Glidden Rural Electric Co-operative vs. Iowa Employment Security Commission 236 Iowa 910, 20 NW 2d 435, and Bates vs. Connecticut Power Co. 130 Conn 256, 33 A 2d 342. The Glidden case was decided primarily on the basis that this particular rural co-operative had never constructed any lines of its own and had always contracted out all line construction. The Bates case was decided on the basis that a public highway where the accident occurred did not constitute premises under the company's control and therefore the Workmen's Compensation Act of Connecticut did not apply to this particular situation. The present record establishes beyond any doubt that the Washington Water Power Company does construct its own electric transmission lines and that the accident occurred on the premises of the Washington Water Power Company and not upon a public highway.

The deposition of Plaintiff's witness, Mr. Ed Raunig (TR. 97-122), the adverse deposition of defendant's witness Jack Inman (TR. 122-141), as well as the depositions of another member of the crew (TR. 142-159), also establish without denial and beyond question many other facts which are not and never have been refuted or denied in any way by appellant.

II

Appellants' allegations with respect to negligence are set forth in paragraph six of their complaint (TR. 4, 5). Ground (a) is that "prior to crossing the said 13,000-volt line above described, the deceased's employer requested the defendant to cut off the power of said electrical power line so that the crossing by the transmission line could be made in safety and that the defendant neglected, failed to (sic) refused to comply with said request." The allegation in the complaint as set forth is somewhat ambiguous; and in passing upon the sufficiency of the complaint the trial court gave every intendment in favor of the plaintiff.

Construing the record as now before the court in the light most favorable to Appellants, the facts with respect to this matter are that during the course of the job, after agreeing to make all crossings hot, the contractor requested informally that all lines be shut down while the crossings were made and that he brought the subject up just prior to the making of the crossing in question (TR. 104). The record shows that the Washington Water Power Company determined at the beginning of the job and all the way through the job that it could not shut down or kill the line in question because of the dependence of a great number of people upon the electric service supplied by this line. The customers existing on this line are detailed in the affidavit of Virgil Thompson (TR. 78-81). Appellants made no attempt to deny the facts set forth in the affidavit of Virgil Thompson other than to submit an affidavit of one of

their attorneys (TR. 86) which contains merely general statements that “the area served by this line was sparsely populated; that the packing plant was not operating; that the mines operating in the area were operating on a very limited basis on the date the accident occurred; the date the accident occurred fell on a Sunday and the line could have been de-energized with a minimum of inconvenience to the users of power in that area,” (TR. 86).

Appellants also submitted an affidavit of Jack Inman containing a conclusion that the electricity could have been shut off on Sunday (TR. 89)—although in his deposition he stated that when a line is shut down for part of the operation, it is shut down for the whole operation (TR. 135); and further stated that the line was strung on Wednesday or Thursday (TR. 128). Affidavits must be made on personal knowledge. Flimsy or transparent charges or allegations are insufficient to state a justiciable controversy.

Rule 56 (e), Federal Rules of Civil Procedure. *Sabin v. Home Owners Loan Corporation*, 151 F. (2d) 541, cert. den. 66 Sup. Ct. 1011, 328 U. S. 840, 90 L. ed. 1615; Reh. den. 66 S. Ct. 1362, 328 U. S. 880, 90 L. ed. 1648.

Schreffler v. Bowles, 153 F. (2d) 1; cert. den. 66 Sup. Ct. 1366, 328 U. S. 870, 90 L. ed. 1640.

U. S. v. Britten, 161 F. (2d) 921.

Appellee moved to strike these affidavits. For the purposes of this argument, however, we may assume that all statements set forth in the affidavits which could possibly be construed as statements of fact are

true. Assuming that a few of the industrial customers were not operating or were not operating full force, the Power Company, as a public service company, would not be justified in shutting down power to the customers admittedly served by the line for the time required to make the crossing. The period involved is not just Sunday when the accident occurred, but also Thursday when the operation commenced. Appellants completely overlook that this work was being done for the benefit of the defendant; and whether it did this work with its own crews or through the medium of a contractor, if the Power Company should, for its own purposes, deprive a large group of people of electricity in order to perform a reconductoring operation, particularly where such work required a substantial period of shutdown and could be done without inordinate danger if properly done, it would be sadly remiss in its duty to the public. For the courts to permit a jury to find the Power Company guilty of negligence for doing what its duty to the public required it to do would not only be illogical but also highly unjust.

The case most closely in point on this matter is a recent case decided by the New York Court of Appeals: *Nicholas v. New York State Electric and Gas Corp.*, 308 NY 931, 127 NE 2d 84. See also same case, 127 NY Supp. 2d 490. The Court of Appeals affirmed the Supreme Court Appellate Division in a memorandum decision. The Appellate Division, in reversing a judgment entered upon a jury verdict for plaintiff, said:

“Concededly, the defendant was required to exercise reasonable care to see to it that plaintiff was

not injured while upon its premises. In considering its duty to exercise such care, we should not overlook that it was a public service corporation which was under a continuing duty to supply current to its customers." 127 NY Supp. (2d) at 497.

The second ground of negligence (b) "That the defendant, in violation of its duty at the time and place above mentioned, negligently failed to provide the deceased with a safe place in which to work," of course, merely states as a legal conclusion the more definite ground of negligence alleged in (a), which was the requirement of the Power Company that the crossing be made "hot." It was argued before the lower court, although appellant makes no mention in its brief, that the proprietor of a business or property owes to employees of contractors working on its premises the duty of furnishing them with a safe place in which to work. Plaintiff, however, neglected to consider the second part of this well-known rule, that the proprietor owes the duty to the employees of the contractors either to furnish a safe place in which to work or to give warning of the danger involved, ie. he must warn them of any hidden dangers. *Gagnon v. St. Maries Light and Power Co.*, 26 Idaho 87, 141 P. 88; *Deaton v. Board of Trustees of Elon College*, 226 NC 433, 38 SE 2d 561; *Storm v. New York Telephone Company*, 270 NY 103, 200 NE 659. The record is clear that the Contractor at all times knew that the crossing would be made hot. There is no question of a "hidden danger" involved in this case.

The third ground of negligence alleged by the plaintiff was "(c) That defendant with knowledge of the

dangerous condition existing in installation of the transmission line in close proximity to its power line, failed and neglected to install proper safeguards and take proper precautions to prevent contact with its power line." The work was being performed by an independent contractor. Appellant concedes—in fact they urge very strenuously,—that the contractor by whom Mr. Beedy was employed was an independent contractor. They do not allege, nor could they allege, that Contractor was not experienced in line construction. Plaintiffs' witness, Mr. Ed F. Raunig, who was superintendent of Contractor, admitted on cross-examination that he determined what type of guard structure to be used at a crossing and whether or not the guard structure should be used or would be used in a particular manner. (TR. 116). A guard structure had been erected at the crossing, which had it been properly used, would have prevented the accident. There is no allegation or contention that the Appellee had any knowledge that the guard structure wasn't being used, nor do any cases cited above or any cases of which we have knowledge go to the extent of holding that the proprietor of premises must carefully watch and actively prevent any of the contractor's employees from negligently injuring themselves where the danger is open and apparent and is as well known to the contractor and his employees as it is to the proprietor of the business.

While there were other accidents that had occurred on this job, there is no showing that these accidents were similar to the accident in which Mr. Beedy was killed, or that these accidents would be relevant except to ad-

wise the Power Company of a fact otherwise well known—that the electrical construction business is a hazardous business.

The proximate cause of the death of George Beedy was the negligence of the Contractor in not using the guard structure; in refusing to allow the lineman on the pole to snub off the line to prevent it from running down the hill; and in not using its telephone circuit to warn the workmen that the line was sagging into the distribution line. (TR. 120, 134, 148, 149, 150, 155). An employer is not bound to supervise the progress of contract work for the purpose of preventing the commission of collateral torts by the contractor. 27 Am. Jur. 513 (Independent Contractors Sec. 35), 18 ALR 801, et seq., 44 ALR 932, 949. The fact that the work is to be done under the general supervision of an agent for the employer, or that the employer inspected the work to see that it was performed according to contract, does not change the relation from that of independent contractor to that of mere servant. *Goble v. Boise-Payette Lumber Co.* 38 Idaho 525, 224 P. 439.

III

In any event, the record conclusively establishes that the defendant-appellee stood in the relationship of employer to Mr. George Beedy at the time of the accident. The facts with respect to this matter are clear and undisputed. The question of whether or not the Power Company is an employer under the Idaho Workmen's Compensation Act is a question of law. Certainly nothing is to be gained by having a jury trial prior to decid-

ing this very vital and important issue. The undisputed facts are:

1. That the Power Company is an electric utility company or public service company engaged in the generation, transmission, and distribution of electric power and energy. As such, it owns both transmission and distribution lines. The Power Company and all of the other major electric utility companies in Idaho maintain crews to construct both transmission and distribution lines. These companies also employ the services of independent contractors when their own crews are not able to handle the volume of work required by circumstances and the demand for expansion (TR. 66, 69, 70, 73, 76).

Under the terms of the contract between the Power Company and the Contractor, the Contractor was replacing certain materials, including conductors, on poles belonging to the Power Company. The materials were the property of the Power Company and were merely being put into place by the contractor (TR. 31).

The Idaho statutes involved are: Sec. 72-203 of the Idaho Code, which provides as follows:

Right to Compensation Exclusive.—The rights and remedies herein granted to an employee on account of a personal injury for which he is entitled to compensation under this act shall include all other rights and remedies of such employee, his personal representatives, dependents, or next of kin, at common law or otherwise, on account of such injury.

Employers, who hire workmen within this state to work outside of the state, may agree with such

workmen that the remedies under this act shall be exclusive as regards injuries received outside this state by accident arising out of and in the course of such employment; and all contracts of hiring in this state shall be presumed to include such an agreement. (1917, ch. 81 Sec. 6, p. 252; reen. C. L. 256:6; C. S. Sec. 6219; I. C. A., Sec. 43-1003.)

Sec. 72-204 of the Idaho Code provides as follows:

Liability of Third Persons.—When an injury for which compensation is payable under this act shall have been sustained under circumstances creating in some other person than the employer a legal liability to pay damages in respect thereto, the injured employee may, at his option, either claim compensation under this act or obtain damages from or proceed at law against such other person to recover damages; and if compensation is claimed and awarded under this act, any employer having paid the compensation or having become liable therefor shall be subrogated to the rights of the injured employee to recover against that person: provided, if the employer shall recover from such other person damages in excess of the compensation already paid or awarded to be paid under this act, then any such excess shall be paid to the injured employee less the employer's expenses and costs of action. (1917 ch. 81, Sec. 7, p. 252; reen. C. L. 256:7; C. S., Sec. 6220; I. C. A., Sec. 43-1004.)

Sec. 72-811 of the Idaho Code provides as follows:

Contractors and subcontractors.—An employer subject to the provisions of this act shall be liable for compensation to an employee of a contractor or subcontractor under him or who has not complied with the provisions of section 72-801 in any case where such employer would have been liable for compensation if such employee had been working directly for such employer. The contractor or subcontractor shall also be liable for such compensa-

tion, but the employee shall not recover compensation for the same injury from more than one party. The employer who shall become liable for and pay such compensation may recover the same from the contractor or subcontractor for whom the employee was working at the time of the accident. This section shall be in force as to all contracts made subsequent to March 15, 1921. (C. S., Sec. 6287A as added by 1921, ch. 217, Sec. 19, p. 474; I. C. A., Sec. 43-1611.)

Sec. 72-1010 of the Idaho Code provides as follows:

Employer. — “Employer,” unless otherwise stated, includes any body of persons, corporate or unincorporated, public or private, and the legal representative of a deceased employer. It includes the owner or lessee of premises, or other person who is virtually the proprietor or operator of the business there carried on, but who, by reason of there being an independent contractor, or for any other reason, is not the direct employer of the workmen there employed. If the employer is secured it includes his surety so far as applicable. (1917, ch. 81, Sec. 110a, p. 252; reen. C. L. 256: 110a; C. S. Sec. 6320; I. C. A., Sec. 43-1806.)

It can be readily seen from the above-quoted Code sections that Appellants are barred in this action if the defendant in this case comes within the definition of “employer” as set out in Idaho Code Sec. 72-1010. It is obvious from this statute that there are two types of employer under the statute; one is a common-law employer, the other is the owner or lessee of premises or other person who is virtually the proprietor or operator of the business there carried on who has employed an independent contractor to perform his work for him. Appellant has confused the issue by citing, out of con-

text, language from Idaho cases where the Court was concerned with the first type of employer-employee relationship. There is, of course, no contention on the part of the Power Company that it was the common law employer of Mr. George Beedy. The discussion in appellants' brief, pp. 15, 17, and other places, relative to control as establishing the employer-employee relationship, is of course irrelevant so far as the issue of law here is concerned. The sole question is a very narrow issue, and that is whether or not the defendant (Appellee) was the owner or lessee of premises or other person virtually the proprietor or owner of the business there carried on, but who by reason of there being an independent contractor was not the direct employer of the workman involved. The contention of the appellee is that it definitely was the proprietor or operator of the reconductoring business being carried on on its premises.

The test to be applied to determine what is the business of the defendant and whether certain operations are part of its business is not entirely free from difficulty, it must be conceded. There have been many cases from different jurisdictions in the United States which have passed upon this problem. We could not review all of these cases in the limited space allowed in this brief, but there are three extensive annotations—50 ALR 872, 105 ALR 580, and 150 ALR 1214—which review many of the cases. It must be borne in mind, of course, that the Workmen's Compensation statutes vary from state to state; and when applying the decisions of other states to the law of Idaho, any differences in the Statute must

be observed. The cases, however, make it quite clear that each operation in each different type of business must be carefully analyzed.

In connection with the statutes, appellants have in this court and the court below attempted to create an entirely new test for determining what constitutes a person the proprietor of a business by asking the question whether or not the particular proprietor or owner of the business has engaged in performing the particular operation for others for hire. This of course would narrow the coverage of the statute to contractors and subcontractors and would completely eliminate principal owners and proprietors of businesses. While there are some states which have statutes specifically so drawn, to so restrict the Idaho statute is completely untenable.

One type of case which analyzes a statute similar to the Idaho statute is set forth at some length by appellants in their brief at page 21, the case of *Sears Roebuck and Co. v. Wallace*, 172 F 2d 802. In this case, Sears Roebuck hired an independent contractor to make alterations on its warehouse building. Of course, the owner of a warehouse conducts his business within that warehouse and may never touch it or perform any alterations on it from the time he moves in until the time he moves out. He seldom, if ever, has in his employ carpenters, steelworkers, and others who would perform the jobs involved in expanding, constructing, or altering a warehouse. Such an operation is wholly outside of the normal business performed by a warehouseman or by a retail or wholesale store.

The case of *Moon v. Ervin*, 64 Ida. 464, 133 P. 2d 933, cited by appellants in their brief, page 14, is a similar type of case although even more clearly a case where the Act would not apply. Certainly, no one would conceive that a person who employed a contractor to build a private home for him would be considered as being in the home-building business.

There are a number of Idaho cases construing the Idaho statute. These include *Modlin v. Twin Falls Canal Co.*, 49 Ida 199, 286 P. 612; *Hiebert v. Howell*, 59 Ida 591, 85 P. 2d 699; and *Gifford v. Nottingham*, 68 Ida. 331, 193 P. 2d 831. None of these cases is closely in point, nor are any of the Idaho cases very closely in point. However, the Idaho court in the case of *Gifford v. Nottingham*, 68 Ida. 331, 193 P. 2d 831, at P. 835, sets forth the test of what constitutes an employer under the statute in the following words:

“Did the work being done pertain to the business, trade, or occupation of the defendant carried on by it for pecuniary gain? If so, the fact that it was being done through the medium of an independent contractor would not relieve the defendant from liability.”

The court was in this instance speaking of liability for compensation under the Act.

The case of *Gifford v. Nottingham*, however, is also the only Idaho case which by any stretch of reasoning could be construed as favoring the plaintiff's contention in this matter. In the case of *Gifford v. Nottingham*, the Court stated by way of dictum that the city is not in effect the owner or proprietor of the business of digging

sewers. This matter, we are sure, was considered in the case very casually and with very little thought. As a matter of fact, it was completely unnecessary to the decision. The city in that case was not a party to the action and its liability was irrelevant.

Idaho Code, Sec. 72-811 provides in part:

“The contractor or subcontractor shall also be liable for such compensation, but the employee shall not recover compensation for the same injury from more than one party.”

Clearly under the statute, the defense of the contractor in the particular case, that the city was the proprietor of the business and therefore the contractor was not liable for compensation was completely irrelevant and should have been disposed of on that ground. However, even if we consider that this dictum is an expression of the Idaho Supreme Court that a city is not in the business of digging sewers, there is certainly a wide distinction between a city digging sewers and an electric utility company reconductoring its transmission lines. Cities clearly aren't in the business of constructing sewers for pecuniary gain; on the contrary, sewers are constructed out of tax or assessment money purely as a public service and certainly not with any thought of any pecuniary gain. In addition, while it is doubtful that any evidence was introduced on this point, it might easily have been assumed by the Idaho Supreme Court that generally speaking, cities do not dig sewer trenches and install sewer pipe by means of their own employees; rather such jobs are, as a general rule, contracted out to independent contractors.

In order to resolve this question, it is necessary to consider very carefully the nature of the electric utility business and consider decisions from other states having like statutes concerning the status of public utilities. An electric utility company constructs power plants or purchases wholesale electricity from other sources. It constructs, owns, and operates heavy transmission lines running from one city to another or from one area to another; it owns and operates secondary distribution lines of medium voltage which run to different sections of the city or smaller sections of the countryside. It also builds, owns, and operates smaller distribution lines which lead into private homes or businesses. Once a customer is connected up, he merely pushes a button in order to receive service from the electric utility. An electric utility company receives payment from its customers depending upon the amount of electricity so used, it is true; but under public service regulation, applicable in Idaho and nearly all states of the United States at the present time, the earnings or profits of the electric utility depend upon the allowance by a Public Utilities Commission of a reasonable rate of return on property in which the utility has invested. From this standpoint, it is wholly different from an ordinary factory which fabricates machinery or other types of merchandise and ships it out into the channels of commerce to be sold to some ultimate customer. If a utility builds new facilities, it is then entitled to earn more money. So long as the electric transmission lines—both primary, secondary, and distribution—are maintained and in good working order, and so long as they are expanded to

take care of the needs of potential customers, the product of the utility is automatically delivered.

Consequently, the main business of utilities is constructing and maintaining their lines so that the consumer will be able to receive service by pushing a button. Electric utilities, with very rare exceptions, maintain crews of linemen who construct, repair, and maintain the transmission lines upon which the business of the utility company depends. Only when their own crews are completely occupied and the volume of work is greater at a particular season of the year or a particular time than their crews can handle, do they contract out such work.

The cases which have been decided in the different states have universally recognized that the construction of transmission lines and the construction of the plant facilities of the company are part of the trade or business of a utility. Appellant cites four cases in this brief (Br. 24, 25). The first of these—*Glidden Rural Electric Co-op v. Iowa Employment Security*, 236 Iowa 910, 20 NW 2d 435—has been mentioned very briefly before. In this case the statute referred to the “usual” business. In order to arrive at a decision holding that the construction was not within the usual scope of business of the co-operative, the Court discussed the term “usual” for three pages and laid great stress on the fact that in the case of this electrical co-operative, construction work was and had been uniformly delegated to a contractor. This was a 5-4 decision and the dissenting opinion is very compelling in its reasoning, and in particular its

position that the majority opinion does not constitute a liberal construction of the statute. The majority opinion might also be questioned because it makes the determination under the statute a subjective rather than an objective one based on standards in an industry. However, since the word "usual" does not appear in the Idaho statute, the inference can be readily drawn that had the Iowa statute been couched in the same terms as the Idaho statute, the decision would have been different. Finally, since the Power Company in the present case does do and regularly has done a large proportion of its line construction work, the result in the present case would be favorable to the Power Company if the reasoning of the Glidden case were applied to this controversy. (This case did involve an employment security statute rather than workman's compensation statute, but it is an application of a similar definition of "employer.")

The case of *Bates v. Connecticut Power Company*, 130 Conn. 256, 33 A 2d 342, is cited by Appellants (App. Br. 25) as sustaining their contentions in this matter. On the contrary, the holding in the case is directly opposed to the contentions of the plaintiffs. The Court found that the construction of transmission lines was part of the business of the utility, but under the Connecticut act it was required that the accident occur on the *premises* under the company's control. The Idaho statute is not quite so specific about the matter of the accident having occurred on the premises of the employer. On the contrary, no Idaho case has made such a distinction and the Idaho cases have repeatedly cited

O'Boyle v. Parker-Young Co., 95 Vt. 58, 112 A. 385, where under an almost identical statute the act was held to apply even though the accident occurred on a bridge on a public highway. In any event, however, it is conceded that in the instant case the accident occurred on the premises of the Power Company; and under the rule of the Bates case, the judgment in this case should be sustained.

The case of *Jones v. Florida Power Company* (Cited on p. 24 of appellant's brief) is of no assistance in deciding the present controversy. A reading of that case and the cases cited therein shows that the statute interpreted there bears no resemblance to the Idaho statute.

The case of *Pittsburgh Plate Glass Co. v Carey*, 98 F. 2d 533, cited on p. 25 of appellant's brief, is also of no assistance. It does not involve utility construction at all. It is a case involving two contractors working on a building where the employees of one gave the employees of another a hand in the construction.

The case of *Iowa-Illinois Electric Co. v. Industrial Commission, et al*, cited on p. 25 of appellants' brief, is also of little help. The statute involved is considerably different from the Idaho statute. In fact, under the Illinois statute being construed in that case, there would be no question that the decedent in the present case would clearly fall within the coverage of the workmen's compensation act. The case, in fact, involved a window washer who was washing the windows on the outside of an office building, part of which was being leased by the utility company.

On the other hand, every case which we have been able to find and which apparently the appellants have been able to find involving actual utility construction has unanimously held that utility construction is part of the business carried on by a utility company. We have already discussed the two cases cited by appellants in their brief. In addition to these cases are the cases of *Chicago and E. R. Co., v. Kaufman*, 78 Ind. App. 474, 133 NE 399, involving a construction contractor for a railroad company; *Lessley v. Kansas Power and Light Co.* 171 Kans. 197, 231 P. 2d 239, involving a contractor erecting new buildings and installing steam boiler turbines, generators, etc., for a power company, which case is followed in similar cases in *Primm v. Kansas Power and Light Co.*, 173 Kans. 443, 249 P. 2d 647, and *Sheahan v. Kansas Power and Light Co.*, 172 Kans. 399, 241 P. 2d 515. Also the case of *Williams v. Cities Service Gas Co.*, 139 Kans. 166, 30 P. 2d 97, which involved a contractor engaged to dig a ditch on a gas company's right-of-way for extension of a gas line; and *Marchbanks v. Duke Power Co.*, 197 N.C. 356, 2 SE 2d 825, which involved a contractor painting power poles for an electric utility company.

CONCLUSION

Appellants in their conclusion (BR. 26-27) refer to the inadequacy of the compensation under workmen's compensation act, which of course is not a matter before the Court. The tenor of their brief is to the effect that to hold that this employee of a contractor for the power company was under the workmen's compensa-

tion would be a restrictive interpretation of the statute or a strained construction of the statute. Had this been a case where a power company had been irresponsible and hired a contractor who had not qualified under the workmen's compensation act, and had the power company denied its liability under the workmen's compensation act, then it would be quite evident that the appellants in this case would be claiming that to allow the power company to escape its obligations under the workmen's compensation act by employing an irresponsible independent contractor would be unthinkable. In such a conclusion, however, we would be constrained to agree.

The purpose of the workmen's compensation act was to make certain that workmen killed or injured in the performance of their duty in an industry would be compensated regardless of negligence; and in order to prevent any industry or employer in an industry from avoiding or evading this responsibility, the statute defining employer was made much broader than the ordinary common law definition of employer. The record in this case with the facts and figures set out—not just conclusions as stated by appellants—show conclusively that the reconductoring of transmission lines is part of the ordinary business of a utility company which it normally performs for itself; that to allow a utility company to contract out this work and escape the responsibility under the workmen's compensation act would be contrary to the obvious and evident intent of the statute. As an incident to this obligation and this

responsibility, there follows an immunity from ordinary civil suits.

We respectfully submit that the action of the acting District Judge granting summary judgment was proper and the judgment should be affirmed.

Respectfully submitted,

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No. 14894

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of the Application of

MELVILLE C. WILLIAMS,

for Writ of Mandamus.

Motion to Dismiss, Return and Answer and
Respondent's Brief.

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*Attorney for Respondent by Appointment
Pursuant to a Resolution of the Los
Angeles Bar Association.*

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Of Counsel.

FILED

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No. 14894

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of the Application of

MELVILLE C. WILLIAMS,

for Writ of Mandamus.

Motion to Dismiss Petition for Writ of Mandamus
and to Discharge the Rule to Show Cause Why
Order Revoking Special Admission of Melville
C. Williams to Practice in Respondent Court for
One Cause Only Should Not Be Vacated.

The Respondents James M. Carter, District Judge of the United States District Court for the Southern District of California and the other judges and officers of said United States District Court, appearing by counsel, move the Honorable United States Court of Appeals for the Ninth Circuit to dismiss the petition for writ of mandamus, and to discharge the rule to show cause, upon the following grounds:

1. That said petition and exhibits presented therewith do not state sufficient facts to show that Petitioner is entitled to a writ of mandamus.

2. The petition is incomplete in that it does not contain and is not accompanied by all of the pleadings, transcript of hearings, pre-trial conferences, motions, rec-

ords of proceedings in the Respondent Court, evidence, records, files, or exhibits which were in the record and before the Court and considered by it when it heard the Petitioner and made the order of July 26, 1955, filed July 27, 1955, vacating the minute order dated June 16, 1952, specially admitting Petitioner Melville C. Williams to practice in the Respondent Court for the purpose of the cause of *Winckler v. Sunkist, Inc., et al.*, only. The petition contains matter not in the records, files, or transcript of said case.

3. Petitioner has a plain and adequate remedy under and by virtue of the appeal, filed on August 24, 1955, by Petitioner, which is now pending, in said cause from the order of Respondent Court made July 26, 1955, and filed July 27, 1955, vacating said minute order specially admitting said Petitioner to practice in the Respondent Court for said cause only.

4. The petition, exhibits, files, and record of proceedings in this matter show the exercise of sound judicial discretion by the Respondent Court in the conduct of the hearings and the making of its order revoking the limited permission to participate in said cause then pending before the Court in that:

- (a) The order was made only as a result of hearings after actual notice in open court on June 1, 1955, and June 2, 1955, and both oral and documentary evidence was given by Petitioner and received by the Respondent Court in the hearings of said matter.
- (b) Said oral and documentary evidence was offered and arguments were made by members of the Bar of Respondent Court acting on behalf of Petitioner in his presence and in open court.

(c) Petitioner, by causing repeated costly delays, splitting the issues, failure to timely advise the Court that it was never his intention to try the cause but that other attorneys were to be brought in for that purpose, failure to advise the Court until May 27, 1955, that he intended to move to dismiss, when defendants' time to so move had expired January 14, 1955, failure to simplify the trial by entering into reasonable stipulations, and conduct, actions, omissions, and attitude at pre-trial conferences and hearings, showed deliberate disregard or ignorance of Rule 16, Federal Rules of Civil Procedure, and Rule 9 of the Respondent Court so as to seriously interfere with the administration of justice in and offend the dignity and purpose of such Court.

(d) Said order was based on matters occurring in the presence of the Court.

(e) No prejudice or injury could result to any litigant because each was represented by local counsel who are members of the State Bar of California and the Bar of the Respondent Court, and by two other members of Petitioner's law firm, who were always the intended trial attorneys in the cause.

5. The questions raised by the petition for writ of mandamus are moot since the Respondent Court granted motions of Ferris E. Hurd and Thomas C. Strachan, Jr., for permission to appear and participate in the trial of the cause on behalf of the party previously represented by Petitioner (in addition to the local counsel for said party) under and by virtue of the provisions of Rule 1(e) 5 of the Rules of the United States District Court for the Southern District of California.

Wherefore, Respondents pray that the petition for writ of mandamus be denied and dismissed and the rule directed to Respondents herein to show cause be dissolved and discharged.

Dated: November 2, 1955.

WM. HOWARD NICHOLAS,
*Attorney for Respondents by Appointment
Pursuant to a Resolution of the Los Angeles Bar Association.*

No. 14894

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of the Application of

MELVILLE C. WILLIAMS,

for Writ of Mandamus.

RETURN AND ANSWER TO PETITION FOR WRIT OF MANDAMUS.

Respondent James M. Carter, Judge of the United States District Court for the Southern District of California, and the other judges and officers of said United States District Court for the Southern District of California, without waiving the motion to dismiss filed concurrently herewith, for return and answer to the order to show cause and petition for writ of mandamus herein state as follows:

1. That the petition contains allegations and statements respecting questions of fact and interpretations of law which are or may be, pending before the Respondent Court and the Respondent Judge, who is presiding in the action of *Winckler & Smith Citrus Products Co., a corporation v. Sunkist Growers, Inc., a corporation, et al.*, No. 13788, pending before said Respondent Court, which the Respondents may be called upon to find, determine, and decide in disposing of said case. It would be inappro-

priate for the Respondents to make any answer to or comments upon the allegations of said petition in said particulars, and for said reason the Respondents neither admit nor deny the allegations of said petition with respect to Petitioner's statements of said alleged facts and interpretation of the law in said particulars.

2. That said petition and exhibits filed therewith are incomplete and do not contain, but omit, other pleadings, motions, proceedings, and the evidence which was before the Respondent Court at the time that it heard and ruled upon the matter of vacating the minute order dated June 16, 1952, granting Petitioner Melville C. Williams permission to practice before the Respondent Court for the purpose of the above-named case of *Winckler v. Sun-kist* only; and that the ruling of the Respondent Court was made and based upon the entire record before it and all of the proceedings in said case, which record, Respondents assert, is necessary and material in determining whether said minute order should or should not have been revoked. Respondents further state that the order revoking permission for Petitioner to practice in said case was further based upon the acts, omissions, conduct, and attitude of Petitioner before the Respondent Court on pre-trial conferences and hearings in said case.

3. Answering paragraph 4 of the petition, Respondents state that Petitioner understood that he enjoyed permission, pursuant to Rule 1 of the Rules of the United States District Court for the Southern District of California, merely to appear and participate in the particular case of *Winckler v. Sun-kist* only, and that such permission was a limited one. Respondents deny generally and specifically the allegations of paragraph 4.

4. Answering paragraph 5 of the petition, Respondents state that the order dated July 26, 1955, and filed July 27, 1955, merely vacated and set aside the limited purpose order permitting Petitioner to appear and participate in said case, and deny that said order dated July 26, 1955, summarily revoked said prior order of June 16, 1952, and deny that said order dated July 26, 1955, was made without due notice to the Petitioner or a fair hearing in open court; and allege in this connection that the proceedings which resulted in said order dated July 26, 1955, commenced on June 1, 1955, and were continued to June 2, 1955, on which date additional hearings were had and at which time evidence, both oral and documentary, was offered and received by the Court, and the Petitioner was in court and represented by Donald D. Stark and Ross G. Fisher at said hearing, and that the Respondents did not hear any objection to the proceeding with the hearing on the evidence presented, and with the counsel then in court, until the Respondent Court had indicated that it was about to rule unfavorably to the Petitioner. Respondents further allege that Petitioner did not comply with all of the orders of said District Court in connection with his representation of Exchange Lemon Products Co., one of the defendants in said case, and was told by the Respondent Court that he and his client were in default at a pre-trial conference and hearing on the 10th day of May, 1954. (App. 28-31.)

5. Answering paragraph 6, Respondents deny that Petitioner has endeavored at all times to comply with the orders of the said District Court and/or to cooperate with counsel for the plaintiff and intervener therein.

6. Answering paragraph 8, Respondents deny that Petitioner and his said firm had been hindered in their

efforts to prepare said case for trial by the consistent refusals of the plaintiff or the intervener of their attorneys, or by refusals of the process of Respondent Court, for discovery under Rule 37, Federal Rules of Civil Procedure, or under Rule 32 for answers to interrogatories; deny that plaintiff has repeatedly or otherwise refused to describe or limit or define the conspiracy or conspiracies, or the attempts to monopolize or the monopoly or monopolies, or the violations of the Robinson-Pattman Act or the California statutes, alleged in its complaint. Allege that plaintiff has done so in other ways than the amended complaint and refers this Court specifically to Court's Ex. 1 (App. 118-128), dated March 10, 1955. Allege in such connection that Petitioner pursued a course of conduct and strategy of splitting and multiplying issues that obstructed the orderly pre-trial procedure in the Respondent Court, and that Petitioner further refused to stipulate to any material facts on the issues in said action except paragraph 1 of a proposed stipulation submitted by the attorneys for the plaintiff in said action, which paragraph merely recited that plaintiff was a corporation organized under the general corporation laws of California on October 29, 1945, and that it operated a plant for processing citrus product fruit into citrus juices and other citrus fruit products at Anaheim, California.

7. Answering paragraph 9 of the petition, Respondents state that Petitioner failed to cooperate with the plaintiff or the Respondent Court in requests and motions for discovery of documents in the possession and control of defendant Exchange Lemon Products Co.; that on the occasion of the pre-trial conferences and hearings, which began May 26, 1955, Petitioner for the first time,

on May 27, 1955, indicated his desire to file a dilatory plea in the form of a motion to dismiss the amended complaint for failure to state a claim upon which relief could be granted (App. 36), and Petitioner also indicated the desire to make a motion for summary judgment (App. 37), although prior motions and dilatory pleas had been filed and argued theretofore, consisting of motions to strike and motions for a more definite statement, and defendants' time to so move had expired January 14, 1955. [See Affidavit of James M. Carter.]

8. Answering paragraph 11, Respondents deny that Petitioner, at pre-trial conferences, attempted to or did comply with the directions of the Court or cooperated with opposing counsel; deny that the Court for the first time indicated its annoyance over the position taken by Petitioner or with Petitioner on May 27, 1955. Allege that on May 10, 1954, more than one year previous, the Court directed that a finding be made that Petitioner's client was in default of an order of the Court (App. 31), but later chose to withdraw the order, or direction (App. 32). Allege that the default was directly occasioned by the actions and directions given by Petitioner to his co-counsel. (App. 32.)

9. Answering paragraph 12, Respondents deny that Petitioner and his firm attempted in good faith to agree with opposing counsel on stipulations of fact, but allege that Respondent Court was convinced, from the statements and conduct of Petitioner in the various proceedings before it and from the evidence, both oral and documentary, introduced at the hearings on June 1 and June 2, 1955, and from the prior dilatory pleas and motions under Rules 32, 34 and 37, that Petitioner's technique and purpose was one of attrition and delay calculated to

exhaust his opponents and hinder and delay the ordinary judicial processes in the Respondent Court.

10. Answering paragraph 13, Respondents admit that Petitioner advised Respondent Court for the first time May 27, 1955, that it was intended that Ferris E. Hurd appear for defendants as chief counsel for the purpose of the trial, and allege in this connection that Petitioner stated in open court that he knew from the beginning that Petitioner was not going to be the chief trial counsel. In this connection, Respondents allege that a motion and order have since been made admitting said Ferris E. Hurd and Thomas C. Strachan, Jr., under said Rule 1, giving them Special permission to practice before the Respondent Court in this case, representing all the defendants named therein, including Exchange Lemon Products Co., the nominal client represented by Petitioner. [See minutes of Court attached to Affidavit of James M. Carter.] The Respondents further state that, in addition to said Ferris E. Hurd and Thomas C. Strachan, Jr., and the Petitioner, Clayson, Stark & Rothrock and Donald D. Stark are also named as attorneys for defendant Exchange Lemon Products Co.

11. Answering paragraph 15, Respondents deny that the Court's conclusions on the crucial issue of attrition were largely influenced by the matters alleged by Petitioner; instead, Respondents rely on the whole record of the case.

12. Answering paragraph 17 of the petition, Respondent Court admits that it denied a request for a further continuance from June 2, 1955, on the hearing of the revocation of the order dated June 16, 1952, granting Petitioner special permission to appear and participate

in said case of *Winckler v. Sunkist*, and alleges in this connection that Petitioner's request was for time to present witnesses to present to the Court "the full picture of what occurred and how much was accomplished during the negotiations for the stipulation," and denies that Petitioner was refused any request to present witnesses and other evidences of his "good faith," and Respondent Court alleges that a full and fair hearing was had upon the question of whether Petitioner's said permission should be revoked, and that evidence, both oral and documentary, and arguments of counsel were made on behalf of Petitioner prior to Respondent Court's ruling and ordering the revocation of Petitioner's special permission to so appear and practice in said case.

13. Answering paragraph 18 of the petition, Respondent Court alleges that the findings of fact objected to in paragraph 8, namely, that said Petitioner, Melville C. Williams, has engaged in practices of "attrition and delay in representing defendant, Exchange Lemon Products Co., which have interfered with the expeditious preparation of the within case for trial," and that "the delay and tactics and practices of attrition of Melville C. Williams have interfered with the administration of justice and the expeditious trial of the within case," are based upon the judgment and opinion of the Respondent Court obtained from all of the records, docket, files, documents, exhibits, oral evidence, papers, and proceedings in the case, and from the actions, omissions, attitude, and demeanor of the petitioner at the hearings and conferences in connection with said action.

14. Answering paragraph 19 of the petition, Respondents allege that the order revoking Petitioner's permis-

sion to appear and participate in said case was made upon just and aggravated cause being shown therefor and misconduct justifying said action; that Petitioner's absence from the State on all but eighty-seven days of the period of over three years while this action has been pending deprived the Court and counsel of adequate control over the case that was necessary to obtain its expeditious preparation, trial, and disposition.

15. Answering paragraph 20 of the petition, Respondents deny that said order dated July 26, 1955, and filed July 27, 1955, was made without due notice or fair opportunity to be heard, but allege in this connection that a full and fair hearing was held and was continued from June 1 to June 2, and on June 2 Petitioner was represented by counsel of his own choosing and offered evidence, both oral and documentary.

16. Answering paragraph 22 of the petition, Respondents state that the order was just and proper and within the legal power and jurisdiction of the Court to make, and allege that it was made with and after due notice and that Petitioner had and was given a full and fair opportunity to be heard and that Petitioner was so heard.

17. Answering paragraph 23 of the petition, Respondents state that said order complained of was correct and proper and constituted an exercise of sound judicial discretion on the part of this Court, and that it was made for just and reasonable cause, upon sufficient and aggravated grounds.

18. Answering paragraph 24 of the petition, Respondents state that Petitioner's remedy on the appeal which he has heretofore taken from said order complained of, and which appeal is now pending, is a full, adequate, and

complete remedy in that other counsel have been brought into the case to act as chief trial counsel in place of Petitioner and that no prejudice will result to Petitioner or his said client on the order complained of, even if the appeal be heard after the trial in said action of *Winckler v. Sunkist* be completed. Respondents further state that Petitioner, by virtue of the Rules of the United States District Court of the Southern District of California, Rule 1(e)5, has eliminated himself from active participation in the arguments of the merits of the action by the bringing in of Messrs. Hurd and Strachan, in addition to Donald D. Stark as attorney for Exchange Lemon Products Co.

19. Answering paragraph 25, Respondents state that the records of the proceedings brought up with the petition are not all of the relevant records and proceedings, but are limited and sketchy and inadequate for the issuance of an extraordinary writ of mandamus as prayed in the petition.

Wherefore, Respondents pray that the rule requiring the Respondents to show cause be discharged and the petition be denied and dismissed.

Dated: November 2, 1955.

WM. HOWARD NICHOLAS,
*Attorney for Respondents by Appointment
pursuant to a Resolution of the Los
Angeles Bar Association.*

NICHOLAS & MACK,
Of Counsel.

State of California, County of Los Angeles—ss.

Wm. Howard Nicholas, being first duly sworn, deposes and says:

That he is the attorney for the Respondents in the above proceedings and makes this verification for the Respondents; that he has read the foregoing return and answer to the petition for writ of mandamus and knows the contents thereof; that the same is true according to the information and belief of affiant, and affiant's information and belief are based upon some of the records included in the above proceedings and on proceedings, files, and records of the case of *Winckler v. Sunkist* in the United States District Court for the Southern District of California.

WM. HOWARD NICHOLS

Subscribed and sworn to before me this 2nd day of November, 1955.

GRACE B. HUNDLEY,
*Notary Public in and for said City
and State.*

No. 14894

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of the Application of

MELVILLE C. WILLIAMS,

for Writ of Mandamus.

Respondents' Brief Opposing Petition for Writ of
Mandamus and in Support of Motion to Dismiss
and to Discharge Rule to Show Cause.

Statement of the Case.

Respondents do not accept the statement of the case presented by Petitioner in certain material particulars hereinafter indicated and also make the following additional statement:

Pursuant to order dated June 16, 1952, Petitioner was admitted to practice in the District Court of the United States for the Southern District of California for the case of *Winckler & Smith Citrus Products Co. v. Sunkist Growers, Inc., Exchange Orange Products Co., Exchange Lemon Products, et al.*, No. 13788, only. Petitioner thereafter acted as lead and chief counsel for Exchange Lemon Products Co. along with the firm of Clayson, Stark & Rothrock and Donald D. Stark, attorneys who are members of the State Bar of California and regularly admitted to the Bar of the Respondent

Court. Petitioner gave no indication and made no statement at any time to the Respondent Court that he was not to try said action, until Petitioner mentioned it incidentally on May 27, 1955, shortly before the date set for the trial. Mr. Ross C. Fisher, a member of the State Bar of California and of the Bar of the Respondent Court and counsel for Exchange Orange Products Co. and Sunkist Growers, Inc., stated to the Court on June 1, 1955, that it had been decided by his clients some time in March of 1955 that Mr. Ferris E. Hurd of Chicago, Illinois, a non-member of the Bar of the Respondent Court, would be the lead trial counsel for Exchange Orange Products Co. and Sunkist Growers, Inc., but that Mr. Fisher would also continue to participate in the trial of the cause.

On or about October 18, 1955, Ferris E. Hurd and Thomas C. Strachan, Jr., of Chicago, Illinois, members of the firm of Pope & Ballard of that City, were permitted to associate with local counsel and appear and participate in the trial of said case as attorneys for all defendants, including said Exchange Lemon Products Co.

During the pendency of said cause, the plaintiff filed a petition under Chapter 10 of the Bankruptcy Act and the trustee intervened as the party plaintiff. The sole asset available to the trustee was the sum of \$2,500.00. Petitioner, while acting as counsel for defendant Exchange Lemon Products Co. in the proceedings before the Respondent Court, resorted to dilatory and attrition tactics, failed to enter into reasonable stipulations as to facts, and obstructed reasonable progress in pre-trial proceedings before the Respondent Court.

During a pre-trial conference on May 27, 1955, and when the trial of the case was set for July 5, 1955, Petitioner announced that he intended to make a Motion to Dismiss the case and a Motion for Summary Judgment, and otherwise obstructed the pre-trial proceedings and orderly settling of issues and non-disputed facts as requested by the Court. Said actions, omissions, and procedures followed by Petitioner resulted in the obstruction of the orderly disposition of Respondent Court's work and oppression to opposing counsel to such a degree that the attorney for the trustee, William C. Dixon, advised the Court on June 1, 1955, that he could come to no other conclusion than to request permission of the Court to be relieved from further handling of the case.

Petitioner's demeanor, methods, and actions interfered with the orderly administration of justice in the Respondent Court and prevented the expeditious trial of the case when set and resulted in the necessity of further continuance of both the pre-trial conference and the trial date. Petitioner's attitude as such counsel caused the Court to conclude that the case was being defended by attrition, by grinding down, by wearing out, by needless multiplying of so-called issues, by splitting issues into as many small parts as possible, by all means that could be resorted to for delay in the arrival at a pre-trial stipulation of facts and a brief statement of issues, to eventually delay the trial of the action, all to make it impossible for the trustee plaintiff litigant to pursue said action. (App. p. 73. See also App. pp. 1-178, on March 8, 1954, and March 11, 1954.)

The proposed stipulations of facts which Petitioner refused to enter into were drawn generally from defen-

dants' answers to interrogatories and defendants' answers to requests for admission in this cause. (App. p. 93.)

Ross C. Fisher, attorney for the other defendants, stated on June 1, 1955, that William C. Dixon, attorney for the trustee, had not engaged in dilatory tactics in connection with the pre-trial stipulation. (App. p. 83.)

At the hearing on June 1, 1955, and at the request of Mr. Fisher and concurred in by Petitioner, the Respondent Court continued the matter until the following morning, June 2, 1955, for further hearing and proceedings.

On the second day of the hearing, June 2, 1955, pertaining to Petitioner's conduct, Petitioner requested a further continuance to prepare his defense, after evidence was received and arguments of counsel made and after the Respondent Court had indicated its intended ruling and order. (App. p. 87.) As a result of Petitioner's conduct the trial date was continued and reset for November 15, 1955. Since the appearance of said Ferris E. Hurd and Thomas C. Strachan, Jr., good progress has been made in the settling of said pre-trial stipulations.

The Respondent Court's order was based upon the record of these proceedings, what has happened, what the Respondent Court observed in open court, Petitioner's sworn testimony before Respondent Court, and related matters. (App. p. 96.)

Questions Involved.

1. Has the Respondent Court the power to revoke the limited permission given under its rules to a non-resident attorney to appear and participate in one case only?

2. If such power exists, was it properly exercised by the Respondent Court in this matter?

3. If the Respondent Court did not properly exercise its judicial power, was there such an arbitrary and despotic abuse of discretion sufficient to justify the granting of the extraordinary remedy of mandamus?

4. Are the matters raised by the petition for Writ of Mandamus moot by virtue of the admitting of Ferris E. Hurd and Thomas C. Strachan, Jr., as attorneys for all defendants, including Exchange Lemon Products Co.?

5. Will mandamus issue where an appeal is pending in this Honorable Court on the same matter?

6. Will Mandamus issue on a partial record in this matter?

Summary of Argument.

A writ of mandamus will not be ordered to restore to a non-resident attorney limited permission to appear and practice in one case only where such permission was revoked by order of the court in the exercise of its judicial discretion for the misconduct charged on the court's own motion to have taken place in the presence of the court. The special permission under local Rule 1(b) is a courtesy and accommodation extended to non-resident attorneys and does not create vested rights tantamount to regular admission to the bar of such court. The right of non-residents to practice is hedged and

limited by conditions, such as having a resident associate attorney on whom notices and orders may be served. The Respondent Court properly exercised its judicial discretion in revoking such limited permission to appear and practice in one case only, where a non-resident chief defense attorney previously granted such limited permission to appear and practice refused, in the presence of the court, to enter into a reasonable stipulation of facts at a pre-trial conference and failed to advise the Respondent Court until the eve of trial that such attorney did not intend to try the case and that it was known from the beginning that two other members of such attorney's firm, also non-residents, would make Motions for Permission to Practice and would try the case, and where such attorney also had made Motions to Make More Definite and Certain, a Motion to Strike and various motions for inspection, admissions, and interrogatories, and particularly where the court observed the attitude and demeanor of such non-resident attorney at the pre-trial hearing on the eve of trial stating that he intended to Move to Dismiss and to Move for Summary Judgment, and based upon all of the records, files, proceedings, testimony, and demeanor of such attorney at all hearings, and where the court, as a result of all of such things, concluded that such attorney had employed and was employing methods of attrition and delay to wear down the attorney and trustee for the plaintiff.

The Petitioner was given a reasonable opportunity to answer the charges of attrition and delay and of improperly concealing from the Court that it was never intended that he try the case. Petitioner was given an opportunity to answer such charges with counsel by the continuance of the hearing on the matter until

the following day, June 2, 1955, at which time Petitioner did purport to answer the charges made against him by William C. Dixon and the Court, and Petitioner was represented by Donald D. Stark and Ross C. Fisher, and evidence, both oral and documentary, having been offered and received and the matter argued by counsel for Petitioner, and the Court, in the exercise of its judicial discretion, properly denied the motion for further continuance by Petitioner and ordered the revocation of his limited permission to practice. The action of the Respondent Court was based upon occurrences in open court and in its presence.

The order complained of is presumed to be reasonable and proper in the absence of clear and unmistakable showing of an arbitrary and despotic abuse of judicial power. The Appellate Court will not review a discretionary ruling on a writ of mandate where there is a conflict of evidence and where there is an incomplete record before the Appellate Court.

Since the Petitioner has taken an appeal from the order revoking his limited permission to appear and practice in one case only and such appeal is still pending, mandamus will not lie to review the action of the Respondent Court, particularly where Petitioner has effectively eliminated himself from appearing and participating in the trial by the admission of two other attorneys from his firm for such purpose, making a total of three attorneys of record in addition to Petitioner, whereas the local rule, 1(e)5, places a limit of two attorneys on each side. The matters raised by the petition for writ of mandamus were rendered moot by the orders admitting Ferris E. Hurd and Thomas C. Strachan, Jr., as counsel for all defendants in said case.

ARGUMENT.

POINT ONE.

A Non-Resident Attorney Given Limited Permission to Appear and Practice in One Case Only Enjoys Merely a Privilege Subject to Revocation by the District Court.

Since Rule 1(b) of the local Rules of the District Court for the Southern District of California does not give a non-resident lawyer permission to practice as a matter of right, but merely allows such non-resident lawyer the privilege in the form of a limited permission resting on the sound discretion of the Court, the same rule of sound judicial discretion should apply to an order revoking such limited permission for occurrences in the presence of the Court. A non-resident lawyer admitted under such Rule 1(b) is not subject to discipline by the organized State Bar of the State of California, not being a member thereof. The non-resident lawyer frequently is untrained in California substantive law, although since the case of *Erie Railroad v. Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, the District Courts must apply the local substantive law. In order for the District Court to efficiently and properly control proceedings, the judge must be permitted to exercise judicial discretion to set aside such order for limited permission to appear and practice in one case only for occurrences in open court; otherwise there would be no way to regulate or control the conduct of such non-resident lawyers short of summary contempt. The remedy of summary contempt is harsh and ineffective to secure performance of affirmative acts, such as cooperating with the Court and opposing counsel in reaching reasonable stipulations of fact and limiting issues, where such out-of-state lawyer

is only within the district of the Court eighty-seven days out of a period of more than three years since the action was filed. If the limited permission be treated as something more than a privilege granted at the discretion of the District Court under Rule 1(b) or a similar rule, District Courts will have to be extremely cautious in admitting out-of-state lawyers in order to control the proceedings in their Courts; and if it were to be determined that a "full-blown" trial be required to revoke an order for such limited permission of a non-resident lawyer to appear and practice, it would in effect be to require the Court to become a party litigant as well as the judge and would make a mockery out of the administration of justice in our District Courts, particularly in cases like this one, where the occurrences were all in the presence of the Court.

An out-of-state attorney has no absolute right to be admitted to practice in other courts.

6 C. J. p. 573, Attorney and Client, Sec. 20;

7 C. J. S. p. 723, Attorney and Client, Sec. 15(b).

Judge Sawtelle, when on the District Court of Arizona, later a judge of this Circuit, stated in *Rouiller v. A & B Schuster Co.* (D. C. Ariz., 1914), 212 Fed. 348 at 349:

"While it is within the power of the court not to permit one not a member of its own Bar to appear before it, it is also a matter resting in the discretion of the court, and it may as it sees fit, allow attorneys of other courts to appear and conduct cases before it."

If there was no right on the part of Petitioner to be admitted specially in the first instance, it is difficult to see how his privilege grows and increases merely because

the Court granted his motion. This would be like pulling oneself up by his boot straps.

Assuming *arguendo* that even though the order of the District Court was based upon happenings in his presence, the law requires that the Petitioner have notice of the Court's proposed order, this requirement was fully satisfied.

The District Court informed Petitioner in detail of the order he proposed to make (App. pp. 72-78) and the District Court set forth the three grounds for the proposed order, which were the same three grounds upon which the order was eventually based:

(1) That Petitioner was a member of the Bar at sufferance by the District Court (App. p. 72);

(2) The Court stated that from what he had "seen and heard" in the court room, and relying on the record on "whatever record there is in this case to date" that Petitioner had defended the case by attrition and delay (App. p. 73);

(3) That Petitioner had failed to reveal to the Court that it was intended at all times that Mr. Hurd be chief trial counsel and this fact had not been disclosed to the Court (App. pp. 77-78).

The Court further said, "I want to give you a chance to be heard, as a matter of fact if you want to think about this until tomorrow morning you may do so, I am not going to take precipitous action in the matter." (App. p. 78.)

Petitioner was given a continuance to the following day and on June 2, 1955, was given an adequate hearing.

The Court then heard from various counsel in the case, including the Petitioner, Williams. (App. pp. 78-86.)

Mr. Fisher, representing Exchange Orange Products stated, "I would like it if the matter could be continued until tomorrow and go into it at that time." (App. p. 86.)

"The Court: . . . If you want the matter to go over until 10 o'clock tomorrow morning I will be glad to do that Mr. Fisher.

Mr. Fisher: I would prefer it.

Mr. Williams: I would, also, like it, of course, your Honor." (App. p. 87.)

The matter was then continued until the following morning.

On the following day, June 2, 1955, the Petitioner asked the Court, "to postpone entering an order and further consideration of this matter until Tuesday of next week. The General Manager of Exchange Lemon Products is not in California, he will be in Chicago and I would like to have an opportunity to talk with him and also talk to my partners about this matter." (App. pp. 88-89.)

The express purpose of the requested continuance it will be noted, was not a request to further prepare or to secure counsel. The Court denied the motion. (App. p. 89.)

Mr. Stark, attorney for Exchange Lemon Products Co. then addressed the Court (App. p. 90) and offered in

evidence certain exhibits which the Court received as the Court's Exhibits 1 to 8. (App. pp. 94-95.)

It was following this that for the first time there was mention made of counsel for Williams.

"Mr. Stark: We hoped there might be an opportunity for Mr. Williams to be heard and present witnesses and evidence on this issue . . . It is Mr. Williams' request that he be entitled to present such a showing and if possible to be represented by counsel of his selection in connection with that showing." (App. p. 95.)

If Stark was not acting as Williams' attorney, then the first request made by Williams for counsel was near the end of the hearing. (App. p. 101.)

"Mr. Williams: . . . I suggest that the court grant a hearing and right to have counsel to present to the court the full picture of what occurred and how much was accomplished during the negotiations for the stipulation."

Thereafter (App. pp. 102-103) the Court made its ruling.

From the foregoing it will be seen that on page 12 of Petitioner's brief, he has overstated his case. "On June 2 petitioner appeared and requested a continuance, stating he had not had time to employ counsel and he wished to call witnesses and present evidence on the question of his good faith." This occurred at the *very end* of the hearing.

POINT TWO.

The Proceedings on June 1, and June 2, 1955, for the Revocation of the Limited Privilege Granted to Petitioner to Appear and Practice Were Made Only After a Clear and Formal Charge Stated in Open Court, a Continuance to Prepare and an Adequate Hearing.

While formal charges are not indispensable, even in the more serious situation of a disbarment of a regular member of the Bar of the District Court, the Respondent Court in this matter meticulously and most clearly informed the Petitioner of the charges against him and granted a continuance till the following morning to prepare for the further hearing. On the following morning a full hearing commenced, at which such Petitioner was in fact represented by able counsel. There are no specific rules of procedure for handling a hearing of the kind involved in this matter, and the action of the Court was clearly an exercise of reasonable judicial discretion incident in the authority to run his own Court. This was not a criminal proceeding against Petitioner.

Herron v. State Bar (1944), 24 Cal. 2d 53, 147 P. 2d 543, 550;

Prime v. State Bar (1941), 18 Cal. 2d 56, 112 P. 2d 881;

Marsh v. State Bar (1934), 2 Cal. 2d 75, 39 P. 2d 403;

Fish v. State Bar (1931), 214 Cal. 215, 4 P. 2d 937, 940;

In re Vaughan (1922), 189 Cal. 491, 209 Pac. 353, 354, 24 A. L. R. 858.

The rules of practice in disbarment proceedings are more flexible than those prevailing in criminal cases, and a formal charge is not indispensable.

Randall v. Brigham, 7 Wall. 523, 74 U. S. 523, 19 L. Ed. 285;

Thatcher v. United States (6 Cir.), 212 Fed. 801.

The criminal cases holding that a defendant is entitled to counsel of his own choice (*Powell v. Alabama*, 287 U. S. 45), and those cited in Petitioner's brief are not helpful. In this civil matter, the Court made a finding that the parties each had other counsel who were members of the bar of the Court (App. p. 3) and that Exchange Lemon Products Co., whom Petitioner also appeared for, would suffer no prejudice by the order setting aside his limited permission to appear and practice. (App. p. 6.)

The scope of appellate review in disbarment proceedings is limited to the inquiry whether there was an abuse of discretion or grave irregularities.

Ex parte Burr (1824), 9 Wheat. 529, 22 U. S. 529.

The following authorities indicate the extent of notice required and the extent of an attorney's rights or privileges to practice before the Court. It is fundamental that the power to disbar or otherwise discipline an attorney is possessed by all courts which have authority to admit attorneys to practice.

Bradley v. Fisher (1871), 13 Wall. 335, 80 U. S. 335, 20 L. Ed. 646;

Ex parte Robinson (1873), 19 Wall. 505, 86 U. S. 505, 22 L. Ed. 205;

Ex parte Wall (1883), 107 U. S. 265, 2 S. Ct. 569, 27 L. Ed. 552;

Conley v. United States (8 Cir., 1932), 59 F. 2d 929;

In re Fletcher (1939), 71 App. D. C. 108, 107 F. 2d 666;

In re Claiborne (1 Cir., 1941), 119 F. 2d 647;

In re Spicer (6 Cir., 1942), 126 F. 2d 288.

Authorities on the Question of Notice.

Ex parte Secombe (1856), 19 How. (60 U. S. 9), was one of the earliest authorities on the question of notice. The Supreme Court of the Territory of Minnesota had removed Secombe from his office as an attorney and counsellor. He petitioned in the Supreme Court of the United States for writ of mandamus directed to the judges of the Supreme Court of the Territory of Minnesota, commanding them to vacate and set aside their order.

At page 15, the Court said:

“ . . . The statute of Minnesota, under which the court acted, directs that the proceedings to remove an attorney or counsellor must be taken by the court, on its own motion, for matter within its knowledge; or may be taken on the information of another. And, in the latter case, it requires that the information should be in writing, and notice be given to the party, and a day given to him to answer and deny the sufficiency of the accusation, or deny its truth.

“In this case, it appears that the offences charged were committed in open court, and the proceedings to remove the relator were taken by the court upon its own motion. And it appears by his affidavit that he had no notice that the court intended to proceed against him; had no opportunity of being heard in his defence, and did not know that he was dismissed from the bar until the term was closed, and the court had adjourned to the next term . . .

“The court, it seems, were of opinion that no notice was necessary, and proceeded without it; and, whether

this decision was erroneous or not, yet it was made in the exercise of judicial authority, where the subject-matter was within their jurisdiction, and it cannot therefore be revised and annulled in this form of proceeding. . . .”

Randall v. Brigham (1868), 7 Wall. (74 U. S.) 523, was an action for damages against a judge for allegedly unlawfully removing an attorney from the bar. The Court said, page 540:

“. . . It is not necessary that proceedings against attorneys for malpractice, or any unprofessional conduct, should be founded upon formal allegations against them. Such proceedings are often instituted upon information developed in the progress of a cause; or from what the court learns of the conduct of the attorney from its own observation. Sometimes they are moved by third parties upon affidavit; and sometimes they are taken by the court upon its own motion. *All that is requisite to their validity is that, when not taken for matters occurring in open court, in the presence of the judges, notice should be given to the attorney of the charges made and opportunity afforded him for explanation and defence.* . . .”

Bradley v. Fisher (1871), 13 Wall. (80 U. S.) 335, states at page 354:

“. . . If, now, we apply the principle thus stated, the question presented in this case is one of easy solution. The Criminal Court of the District, as a court of general criminal jurisdiction, possessed the power to strike the name of the plaintiff from its rolls as a practicing attorney. This power of removal from the bar is possessed by all courts which have authority to admit attorneys to practice. It is

a power which should only be exercised for the most weighty reasons, such as would render the continuance of the attorney in practice incompatible with a proper respect of the court for itself, or a proper regard for the integrity of the profession. And, *except where matters occurring in open court, in presence of the judges, constitute the grounds of its action*, the power of the court should never be exercised without notice to the offending party of the grounds of complaint against him, and affording him ample opportunity of explanation and defence.
. . .”

In re Paschal (1870), 10 Wall. 10 (77 U. S.) 483 at 491:

“ . . . The application is based upon the power which the court has over its own officers to prevent them from, or punish them for, committing acts of dishonesty or impropriety calculated to bring contempt upon the administration of justice. *For such improper conduct the court may entertain summary proceedings* by attachment against any of its officers, and may, in its discretion, punish them by fine or imprisonment, *or discharge them from the functions of their offices*, or require them to perform their professional or official duty under pain of discharge or imprisonment. The ground of jurisdiction thus exercised is the alleged misconduct of the officer. . . .”

In re Claiborne (C. A. 1, 1941), 119 F. 2d 647 at 650:

“ . . . The proceedings for such discipline need not comply with all the formalities of process or other trial procedure. The informality by which action is taken, the charges made, or notice is given to the attorney charged with misconduct, will not invalidate the proceedings. It is sufficient if the

attorney has notice of the charges against him and an opportunity to prepare and present his defense. *Ex parte* Wall, *supra*, 107 U. S. at 271, 2 S. Ct. 569, 27 L. Ed. 552; *Randall v. Brigham*, 1868, 7 Wall. 523, 539, 19 L. Ed. 285; *United States v. Parks*, C. C. Col. 1899, 93 F. 414; *cf.* *Conley v. United States*, *supra*, 59 F. 2d at 935; *United States v. Hicks*, 9 Cir., 1930, 37 F. 2d 289, 292 . . .”

Quoting from the *Claiborne* case with approval, is *Wilbur v. Howard* (D. C. Ky., 1947), 70 Fed. Supp. 930 at 932; reversed on grounds arising out of the death of the attorney, *Howard v. Wilbur* (6 Cir., 1948), 166 F. 2d 884.

Laughlin v. Eicher (C. C. A. D. C. 1944), 145 F. 2d 700 at 702:

“ . . . Respondent might, of course, have punished petitioner for this contempt. But petitioner had already been punished twice, once by respondent and once by another judge, for contemptuous conduct in the trial. Respondent turned from punishment to prevention. He might have instituted proceedings for petitioner’s disbarment or suspension from practice. He chose a more lenient and more promptly effective course. He exercised only the elementary right of a court to protect its pending proceedings, which includes the right to dismiss from them an attorney who cannot or will not take part in them with a reasonable degree of propriety. . . .”

In *Herman v. Acheson* (D. C. Dist. Col., 1952), 108 Fed. Supp. 723, the right of plaintiff, an attorney to practice before the International Claims Commission of the United States was revoked by the Commissioner and affirmed by the defendant Acheson, Secretary of State. He sought an injunction. The Court said, page 726:

“ . . . He apparently, however, proceeds on the theory at variance with fact that proceedings against attorneys for malpractice or any unprofessional conduct should be founded upon the formality of allegations akin to indictment. The fact is that such proceedings are often instituted upon information and as the Supreme Court of the United States has said, in *Randall v. Brigham*, in 1868, 7 Wall. 523, 540, 74 U. S. 523, 540, 19 L. Ed. 285, ‘or from what the Court learns of the conduct of the attorney from its own observation. Sometimes they are moved by third parties upon affidavit; and sometimes they are taken by the court upon its own motion. *All that is requisite to their validity is that, when not taken for matters occurring in open court in the presence of the judges, notice should be given to the attorney of the charges made and opportunity afforded him for explanation and defense. . . .*’ ”

In *Kelley v. Boettcher* (8 Cir., 1897), 82 Fed. Rep. 794 at 797, the 8th Circuit struck a scurrilous brief from the files, ordered the name of the attorney stricken from the record as solicitor and counsel for appellant and stated that “he will no longer be heard in this case either orally or by brief.”

The Petitioner, even if it were to be held that he had vested rights as a member of the Bar of Respondent Court, was given adequate notice and an adequate hearing to protect such asserted rights. *A fortiori*, in this matter, where Petitioner was appearing under a permissive rule only and was charged with misconduct in the presence of the Court at a pretrial conference as well as other hearings before the Court, Petitioner was more than fairly treated in the proceedings for the revocation of his said permissive right to appear and practice before the Respondent Court.

POINT THREE.

The Petition Herein Fails to Show Any "Arbitrary and Despotic" Abuse of Discretion Sufficient to Justify Setting Aside the Order of the Court Dated July 26, 1955, Filed July 27, 1955, Setting Aside Petitioner's Limited Permission to Appear and Practice in One Case Only.

The petition and exhibits are incomplete, much of the testimony at prior hearings not having been written up or otherwise included in the appendix to petition. The Court based its order upon the entire record and all court appearances before the Respondent Court. The appellate court will presume that the record omitted by the Petitioner is adverse and sufficient to sustain the order. The record must positively show the alleged error.

Balestreri v. United States (9 Cir., 1955), 224 F. 2d 915, 918.

There is no sufficient showing in the petition or the exhibits appended thereto or in the record to establish a right to the extraordinary writ of mandamus by a clear abuse of discretion or "usurpation of judicial power" by the revoking of the order of June 16, 1952, for the special permission to practice granted Petitioner. The Petitioner is remitted to his ordinary remedy on his pending appeal where the action of the Respondent Court is not clearly "arbitrary and despotic."

In re Spears (C. A. Mich), 185 F. 2d 456;
Cert. den. 71 S. Ct. 616;
341 U. S. 910;
95 L. Ed. 1347.

In re Fisher (C. A. Ill., 1950), 179 F. 2d 361;
Cert. den. 71 S. Ct. 59;
340 U. S. 825;
95 L. Ed. 606.

Petitioner Williams Has Not Sent Up the Entire Record and His Point No. 3 Need Not Be Considered by This Court.

In his brief (p. 13) Williams states that there has been filed as part of his petition as an appendix, "all portions of the proceedings in the District Court which are relevant to petitioner's conduct before that court." This court is not bound by his conclusion. The entire record should be before the court.

Finding No. VIII found that

"While admitted specially to the bar of this court and while acting as chief trial counsel for defendant, Exchange Lemon Products Co. in proceedings before this court, Melville C. Williams has engaged in practices of attrition and delay—which have interfered with the expeditious preparation of the . . . case for trial . . . (and) interfered with the administration of justice and the expeditious trial of the . . . case." (App. p. 5.)

At the time the Court stated the order it proposed to make (June 1, 1955, App. pp. 72-78) and before it made the ruling (June 2, 1955; App. p. 102) or the order (July 26, 1955; App. p. 7) the court said (App. pp. 72-73):

"and I conclude from the entire record to date, and from what I have seen and heard—and these are in a way intangible, but they are impressions that a judge gets, I can't put my finger on any part of them, but I rely on whatever record there is of this case to date for my conclusions that your attitude has been to see that this case was tried by attrition, by the grinding down, by the wearing out, by the multiplying of issues, by the splitting of issues into as many small parts as possible, by all means that could be attained to detain an arrival at a pretrial stipulation

of facts and a brief statement of issues, to eventually delay the trial of the action, to make it impossible for the trustee, plaintiff litigant, to pursue this action."

The respondent court doesn't know if all proceedings were written up by the reporter, but has possession of the following transcripts with dates and pages as indicated, of which Williams has presented as his record, only a part:

		Presented in Williams Record in Appendix
<u>Date</u> <u>Pages</u>		
<i>Judge Carter</i>		
3-8-54 and 3-11-54	1-178	p. 6, line 6, to p. 8, line 22 p. 21, lines 13-22 p. 50, lines 13-23 p. 60, line 18, to p. 63, line 21 p. 122, line 20, to p. 123, line 22 p. 130, line 23, to p. 132, line 6 p. 157, line 7, to p. 164, line 15 p. 170, line 1, to p. 172, line 20
5-10-54	1-28	p. 1, line 2, to p. 6, line 18 p. 21, line 25, to p. 23, line 2 p. 26, line 18, to p. 27, line 7
11-24-54	1-30	p. 22, line 17, to p. 25, line 8 p. 27, line 7, to p. 28, line 5
2-14-55	1-56	None
5-26-55	1-25	
5-27-53	26-124	p. 92, line 1, to p. 8, line 24
5-31-55	125-193	p. 121, line 12, to p. 124, line 14
6- 1-55	1-53	All pp. 1-53
6- 2-55	54-95	p. 55, line 8, to p. 73, line 14 p. 79, line 23, to p. 82, line 9 p. 92, line 7, to p. 94, line 14

It would be a manifest injustice to decide the case presented on *what petitioner thinks was material*, when the court based its action on the whole record.

As in any proceedings attacking findings, the party seeking review must send up the entire record. Otherwise it will be presumed that the omitted portion, supports the findings.

Balestreri v. United States (9 Cir., 1955), 224 F. 2d 915, 918.

It rests exclusively with the courts to determine who is qualified to become one of its officers, as an attorney and counsellor, and for what cause he ought to be removed. The power, is not arbitrary and despotic but it is the duty of the Court to exercise it by sound and just judicial discretion.

Ex parte Secombe (1856), 19 How. 9, 13.

The method of practice by which the court strikes an attorney's name from the rolls is not jurisdictional. The rule has been stated in this circuit as follows.

"Mandamus will lie to require an inferior court to restore an attorney as a practitioner when the court has exceeded its jurisdiction in striking his name from the roll, but that the manner in which its jurisdiction is exercised—that is to say, the method of practice by which the court's discretion or judicial function is invoked—is not jurisdictional. For errors of the court committed in the requirement of jurisdiction, so that it acts judicially or in the exercise of a sound discretion in determining as to the sufficiency of the mode of procedure, its judgment will not be disturbed on a writ of mandamus."

Barnes v. Lyons (9th Cir., 1911), 187 Fed. 881, 884.

The Supreme Court recognized that jurisdiction rests exclusively with the District Court and stated that it cannot review on mandamus an order removing an attorney, for matters occurring in the presence of the Court, saying:

“In proceeding to remove the relator, the court was necessarily called on to decide whether, in a case where the offense was committed in open court, and the proceeding was had by the court on its own motion, the statute of Minnesota required that notice should be given to the party, and an opportunity afforded him to be heard in his defense. The court, it seems, were of opinion that no notice was necessary, and proceeded without it, and whether this decision was erroneous or not, yet it was made in the exercise of judicial authority, where the subject matter was within their jurisdiction, and it cannot therefore be revised and annulled in this form of proceeding (mandamus).”

Ex parte Secombe (1856), 19 How. 9, 15.

See:

Ex parte Burr (1824), 9 Wheat. 529.

Bankers Life & Casualty Co. v. Holland, Chief Judge, *et al.* (1953), 346 U. S. 379, at 382-383:

“ . . . As was pointed out in *Roche v. Evaporated Milk Assn.*, 319 U. S. 21, 26 (1943), the ‘traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.’ Here, however, petitioner admits that the court had jurisdiction both of the subject matter of the suit and of the person of Commissioner Cravey and that it

was necessary in the due course of the litigation for the respondent judge to rule on the motion. The contention is that in acting on the motion and ordering transfer he exceeded his legal powers and this error ousted him of jurisdiction. But jurisdiction need not run the gauntlet of reversible errors. The ruling on a question of law decisive of the issue presented by Cravey's motion and the replication of the petitioner was made in the course of the exercise of the court's jurisdiction to decide issues properly brought before it. *Ex parte* American Steel Barrel Co., 230 U. S. 35, 45-46 (1913); *Ex parte* Roe, 234 U. S. 70, 73 (1914) . . .”

At page 383:

“. . . The supplementary review power conferred on the courts by Congress in the All Writs Act is meant to be used only in the exceptional case where there is clear abuse of discretion or ‘usurpation of judicial power’ of the sort held to justify the writ in *De Beers Consolidated Mines v. United States*, 325 U. S. 212, 217 (1945). This is not such a case . . .”

At page 384:

“. . . We adhere to the language of this Court in *Ex parte* Fahey, *supra*, at 259-260:

“‘Mandamus, prohibition and injunction against judges are drastic and extraordinary remedies. We do not doubt power in a proper case to issue such writs. But they have the unfortunate consequence of making the judge a litigant, obliged to obtain personal counsel or to leave his defense to one of the litigants before him. These remedies should be resorted to only where appeal is a clearly inadequate remedy . . . As extraordinary remedies, they are reserved for really extraordinary causes.’

“Affirmed.”

In re Mary Hatch Riggs (1909), 214 U. S. 9, at 14-15:

“ . . . We rest our conclusion upon the proposition that the District Court in adjudicating the tunnel company a bankrupt was called upon to decide, and did decide, a question of fact or of mixed law and fact, and that such adjudication cannot be reviewed by proceedings in mandamus. *In re Pollitz*, 206 U. S. 323, 331; *In re Winn*, 213 U. S. 458.

“The rule is discharged and the writ of mandamus denied.”

To admit applicants to practice law is judicial, not legislative, and vested in the courts only.

Laughlin v. Clephane (D. C., D. C., 1947), 77 Fed. Supp. 103;

In re Shorter (D. C. Ala., 1865), 22 Fed. Cas. No. 12.

POINT FOUR.

The Matters Raised by the Petition for Writ of Mandamus Were Rendered Moot by Virtue of the Order Admitting Ferris E. Hurd and Thomas C. Strachan, Jr., in Said Cause as Attorneys for All Defendants, Including Exchange Lemon Products Co.

Rule 1(e)5 reads as follows:

“Only one attorney on each side may examine or cross-examine a witness, and not more than two attorneys on each side may argue the merits of the action unless the court otherwise permits.”

The Petitioner is already disqualified from appearing and participating in the case by virtue of said Rule without the special permission of the Court. Such permission has not been given.

POINT FIVE

Mandamus Will Not Issue Pursuant to This Petition by Reason of Petitioner's Appeal Now Pending in This Matter.

Since the writ of mandamus is an extraordinary remedy, the Petitioner has shown by his own election that his remedy on appeal is adequate. He is also now disqualified from appearing and participating by virtue of the fact that his partners, Ferris E. Hurd and Thomas C. Strachan, Jr., have been permitted to appear and participate in the case on behalf of all defendants, thus exceeding the limit of two under said Rule 1(e)5 of the District Court of the United States for the Southern District of California.

Wherefore, Respondents respectfully urge that this Honorable Court discharge the rule ordering Respondents to show cause and dismiss the petition for writ of mandamus.

Dated: November 2, 1955.

WM. HOWARD NICHOLAS,

*Attorney for Respondents by Appointment
Pursuant to a Resolution of the Los
Angeles Bar Association.*

NICHOLAS & MACK,
Of Counsel.

No. 14,894

United States Court of Appeals
For the Ninth Circuit

In the Matter of the Application of
MELVILLE C. WILLIAMS,
For Writ of Mandamus.

PETITION FOR REHEARING.

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FILED

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United States Court of Appeals For the Ninth Circuit

In the Matter of the Application of MELVILLE C. WILLIAMS, For Writ of Mandamus.	}
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PETITION FOR REHEARING.

*To the Honorable William Denman, Chief Judge, and the
Honorable Albert Lee Stephens and the Honorable
Homer T. Bone, Circuit Judges:*

Petitioner Melville C. Williams and Exchange Lemon Products Company, each severally and not one for the other, respectfully petition this Honorable Court for a rehearing of the Petition for Writ of Mandamus by Melville C. Williams and the Petition in Intervention by Exchange Lemon Products Company, and in support of this petition represent as follows:

Melville C. Williams and Exchange Lemon Products Company each reserve their argued positions as to each of the points in the said Petition for Writ of Mandamus and the said Petition in Intervention but in this petition address themselves to a clearly apparent misunderstanding

as to the nature of the intended duties of Melville C. Williams as attorney for Exchange Lemon Products Company. Such misunderstanding resulted in a decision that a writ of mandamus was not required in order to restore to each of said petitioners the rights guaranteed under the Fifth Amendment to the Constitution of the United States.

POINT ONE.

The opinion of this Court evidences a misunderstanding as to the nature of the intended duties of petitioner Melville C. Williams as counsel for Exchange Lemon Products Company in that it assumes that said Melville C. Williams is not expected or required to appear as an attorney in the trial of the action entitled Winckler & Smith Citrus Products Co. v. Sunkist Growers, Inc., et al., and to participate in that trial as an attorney, under the direction of Ferris E. Hurd, by examining and cross-examining witnesses, presenting evidence, arguing to the court and jury and assuming direction of the conduct of the trial if the need arises.

The opinion of the Court states:

"It appears from the affidavits of his clients that they do not intend to have Williams conduct the trial of the litigation but that they will be represented by other counsel, duly admitted therefor. The attorneys actually having the trial of the case may have Williams sit with them as advisor, as would any non-admitted law clerk or secretary."

Apparently this statement in the Court's opinion is based on paragraph 7 in the Petition in Intervention of Exchange Lemon Products Company, which reads as follows:

“7. Exchange Lemon Products Company has acquainted Melville C. Williams during a three-year period with its files, records, personnel and business practices in regard to the matters alleged in the complaint and amended complaint on file in said action, and Exchange Lemon Products Company believes that the thorough knowledge of these matters acquired by Melville C. Williams over this extended period of time is and will be essential to the attorneys representing petitioner in court during the trial of said action and for that reason petitioner desires said Melville C. Williams to participate in the trial of said action. Petitioner will suffer irreparable injury in the trial of said action if Melville C. Williams does not participate in the trial.”

To clarify any misunderstanding as to what the words “participate in the trial” mean with reference to the relationship between petitioner Melville C. Williams and Exchange Lemon Products Company an affidavit on behalf of Exchange Lemon Products Company has been filed in these proceedings. This affidavit shows that Exchange Lemon Products Company retained Melville C. Williams, not as a law clerk or secretary, but as an attorney, to do, among other duties, subject to the direction of Ferris E. Hurd, the following:

- a) examine and cross-examine witnesses;
- b) present written evidence;

c) argue orally to the court;

d) argue orally to the jury;

e) assume direction of the entire case, in place of Ferris E. Hurd, temporarily or permanently, at any time.

There is no inconsistency in the act of Exchange Lemon Products Company in retaining Ferris E. Hurd as chief trial counsel in the pending action and retaining Melville C. Williams to do the foregoing things. It is common in the trial of a complicated antitrust case for the chief trial counsel to delegate to one of his subordinates the task of presenting certain evidence, examining and cross-examining particular witnesses or arguing particular points of law. The petition of Melville C. Williams and the Petition in Intervention by Exchange Lemon Products Company on file in these proceedings show that Melville C. Williams of all the attorneys is particularly familiar with the personnel and activities of Exchange Lemon Products Company. With the possible exception of Ferris E. Hurd, there is no attorney whose presence at the trial *as an attorney* is more important to Exchange Lemon Products Company.

The opinion of this Court, prior to the trial and necessarily without knowledge of the particular witnesses who may be called and particular problems which may arise in the course of the trial, has resulted in sanctioning the ouster of an attorney whose presence, as an attorney, may well be indispensable to his client. The defense of Exchange Lemon Products Company has been seriously jeopardized before the first witness has been called. The professional rights of Melville C. Williams have been per-

emptorily curtailed: Williams, a reputable and experienced attorney, has been relegated to the status of a "non-admitted law clerk or secretary" for the purposes of a case he has painstakingly prepared over the course of more than three years.

POINT TWO.

Because of such misunderstanding, the Court erroneously concluded that a writ of mandamus was not required in order to restore to said Melville C. Williams and to Exchange Lemon Products Company the rights guaranteed under the Fifth Amendment to the Constitution of the United States.

This Court has previously held that an order revoking a lawyer's right to practice made without notice and hearing is not only error but beyond the jurisdiction of the district court.

In re Los Angeles County Pioneer Society, 217 F.2d 190 (9th Cir. 1954).

As pointed out by Circuit Judge Goodrich, to break off an attorney-client relationship while the case is pending for trial is to cause irreparable injury justifying the exercise of interlocutory review.

Cooper v. Hutchinson, 184 F.2d 119, 123-124 (3d Cir. 1950).

Viewed in this light, the cases cited in the opinion of the Court demand that the writ of mandamus be granted rather than denied in the instant proceeding. The tradi-

tional functions of the writ of mandamus are to confine a court to its prescribed jurisdiction, and to prevent clear abuses of judicial discretion.

Bankers Life & Cas. Co. v. Holland, 346 U.S. 379, 383 (1953).

Both functions are directly involved in the present case.

The instant writ is not being used as a substitute for appeal but is being used to prevent the denial of constitutional rights which no appellate action can possibly restore after trial.

Cf. *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379 (1953), *supra*;

Roche v. Evaporated Milk Assn., 319 U.S. 21 (1943).

CONCLUSION.

Petitioner believes that the foregoing errors occurred through oversight and particularly through inadvertent factual error as to the nature of the precise attorney-client relationship existing between petitioner Melville C. Williams and Exchange Lemon Products Company. Any obscurity in the meaning of the words "participate in the trial" has, however, been clarified by the affidavit which has been filed in these proceedings by Exchange Lemon Products Company. In view of this relationship and in view of the cases cited in the brief of petitioner Melville C. Williams on file herein, petitioners respectfully submit

that this Court should reconsider its opinion and issue the writ of mandamus.

Dated, San Francisco, California,

November 14, 1955.

Respectfully submitted,

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Of Counsel.

CERTIFICATE.

I hereby certify that in my judgment the foregoing Petition for Rehearing is well founded and that it is not interposed for delay.

Dated, San Francisco, California,
November 14, 1955.

HERBERT W. CLARK.

Attorney for Petitioners
Melville C. Williams
and Exchange Lemon
Products Company.

